No. 91-1143

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

OWENS-CORNING FIBERGLAS CORPORATION, *et al.*,
*Petitioners*,

—v.—

MARILYN ROSE WEBB, *et al.*,
*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS AT TEXARKANA

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## QUESTIONS PRESENTED

1. Do principles of international comity form part of the federal common law binding on the states?

2. Do principles of international comity prohibit a Texas court from enjoining a defendant in a Texas action from seeking a ruling from a Canadian court that the claim pressed by a Canadian plaintiff in that action must be decided by a Canadian court, where both the Texas court and a Canadian court have expressly recognized that Canada is the natural forum for the controversy?

## LIST OF PARTIES

Petitioners Owens-Corning Fiberglas Corporation, Armstrong World Industries, Inc., Georgia-Pacific Corporation, Keene Corporation, and National Gypsum Company are defendants in the 71st Judicial District Court, Harrison County, Texas in *Webb, et al. v. Amchem Products, Inc., et al.*, No. 88-0687, and were appellants in the Court of Appeals for the Sixth Supreme Judicial District of Texas at Texarkana in *Owens-Illinois, Inc., et al. v. Webb, et al.*, No. 6-90-085-CV.

Respondents, who include plaintiffs and defendants in the Texas District Court and appellees and appellants in the Texas Court of Appeals, are:

Plaintiffs (appellees in the Texas Court of Appeals): Robert C. Allenback, James Andrew, Ronald Andrew, Ruby Andrew, Christine R. Arial, Alex Batt, Diane V. Batt, Dale Beck, Laurie Beck, John Botwood, Martha Brown, Peter Arthur Henry Brown, Heather J. Bryce, Valerie C. Burke, Gordon Butler, Winnerford Butler, Robert J. Butterworth, Lyla A. Butterworth, Alois Cej, Aurelia Cej, Diane L. Clifton, Chara Conforti, Nicola Conforti, Laurier Dennis Cramps, Lily Davidge, Kenneth A. Flaman, Arthur Foss, Jr., Clara Mary Foss, Clair Foss, Dale Foss, Rodger Ross, Roy Hamilton, Clifford Helmer, Veronica I. Helmer, Andrew Heron, Jesse Heron, William R. Hostyn, Cathy M. Hostyn, Leo Iverson, Barbara James, Margaret Jarosch, Rudolph J. Jarosch, John R. Kennedy, Lillian Kennedy, Dianne M. Koehli, Yvette Pricille Koshman, Aurore L. Kramps, Denis L. Lalonde, Harley Lindquist, Joan Lindquist, Constance V. McNeill, Donald Ralph Meier, Isabelle Meier, Keith David Stanley Meier, Neal Alan Meier, Wayne Martin Meier, Antal Mihaly, Arlene Moen, Marcelle Place, Kelly J. Place, Barbara Ponech, Patrick Thomas Ponech, Daniel Albert Ponech, James F. Potter, Pat Potter, William H. Priestley, Betty Priestley, Ivan Risen, Stephanie Risen, Collette J. Schofield, Ramon Simmons, Earl Solberg, Shirley Solberg, Hilda M. Spencer, Randy W. Spencer, Edwin Torwick, Michael Tyrrill,

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Defendants (appellants in the Texas Court of Appeals): Amchem Products, Inc., GAF Corporation, W.R. Grace Company, Owens-Illinois, Inc., Turner & Newall, P.C., U.S. Gypsum Company.

Other parties:

Defendants: Anchor Packing Company, Babcock & Wilcox Company, Carey-Canada, Inc., Cassier Mining Corporation, The Celotex Corporation, Combustion Engineering, Inc., DAP, Inc., Eagle Picher Industries, Inc., Empire Ace Insulation Manufacturing Corporation, Fibreboard Corporation, The Flintkote Company, Flexitallic Gasket Company, Garlock, Inc., A.P. Green Services, Grefco Inc., John-Crane Houdaille, Inc., Mobil Oil Corporation, Pfizer, Inc., Pittsburgh-Corning Corporation, H.K. Porter Company, Inc., Raymark Industries, Inc., Rockwool Manufacturing Company, 3M Company, U.S. Mineral Products Corp.

Plaintiffs: Norman Barnett Askewe, Patricia Askewe, Noel Eric Charles Broom, Julia Ann Broom, Clarence Cinnamon, Kathleen May Cinnamon, Rosemary Edgar, Arnold J. Fuller, Louise Doris Hurley Feth, Donald W. Hetherington, Audrey Hetherington, Nicholas Hudz, Nellie K. Hudz, Marion Rose Fuell, Bruce Imeson, Margaret Cecila Imeson, William Kowaluk, Louise Margaret Kowaluk, William A.

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## STATEMENT PURSUANT TO RULE 29.1

The petitioners' listing of corporate affiliations is as follows:

Armstrong World Industries, Inc. is a publicly-held corporation with no parent and no subsidiary that has issued shares to the public.

Georgia-Pacific Corporation is a publicly-held corporation with no parent and no subsidiary that has issued shares to the public.

Keene Corporation is a publicly-held corporation with no parent and no subsidiary that has issued shares to the public.

National Gypsum Company's parent corporation is Aancor Holdings, Inc. National Gypsum has no subsidiary that has issued shares to the public.

Owens-Corning Fiberglas Corporation is a publicly-held corporation with no parent and no subsidiary or affiliate that has issued shares to the public.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-_____

OWENS-CORNING FIBERGLAS CORPORATION, *et al.*,

*Petitioners*,

—v.—

MARILYN ROSE WEBB, *et al.*,

*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS AT TEXARKANA

Petitioners are Owens-Corning Fiberglas Corporation, Armstrong World Industries, Inc., Georgia-Pacific Corporation, Keene Corporation, and National Gypsum Company. They seek issuance of a writ of certiorari to the Court of Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, to review that Court's judgment and opinion affirming an injunction issued by the 71st Judicial District Court, Harrison County, Texas.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Supreme Judicial District of Texas at Texarkana and that court's opinion on rehearing are reported as *Owens-Illinois, Inc. v. Webb*, 809 S.W.2d 899 (Tex. Ct. App. 1991), *writ dismissed w.o.j.* (Oct. 16, 1991), and reproduced in the Appendix at A1-11. The order and injunction entered by the 71st

Judicial District Court are reproduced in the Appendix at A17-20, and A13-16, respectively.

## JURISDICTION

The judgment of the Texas Court of Appeals was entered on April 9, 1991. Petitioners' motions for rehearing and second rehearing were denied on May 14, 1991 and July 9, 1991, respectively. Petitioners' application for writ of error to the Texas Supreme Court was dismissed for want of jurisdiction on October 16, 1991.

This Court has jurisdiction to review the judgment in this case by writ of certiorari pursuant to 28 U.S.C. § 1257. *See, e.g., Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Local No. 438 Constr. & General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963).

## STATEMENT OF THE CASE

### A. The Action in Harrison County, Texas.

In July 1988, nine Canadian citizens, all residents of British Columbia, filed suit in the 71st Judicial District Court of Harrison County, Texas, alleging personal injury and wrongful death from exposure to asbestos. Plaintiffs filed pursuant to section 71.031 of the Texas Civil Practice and Remedies Code, which permits citizens of foreign states to sue in Texas for wrongful death or personal injury even where "the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country." Tex. Civ. Prac. & Rem. Code Ann. § 71.031(a) (West 1986).[1] The action is one

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1 § 71.031 provides in pertinent part:

(a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country

of roughly 100,000 lawsuits pending in state and federal courts in this country alleging injury or death from exposure to asbestos products. *In re Joint Eastern and Southern District Asbestos Litigation*, 129 B.R. 710, 746 (E. & S.D.N.Y. 1991). *See generally Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* (Federal Judicial Center 1991). By November of 1990, an additional 207 plaintiffs, all of them Canadian citizens, residents of British Columbia, Alberta, Manitoba, and New Brunswick, had intervened in the action, bringing the number of plaintiffs to 216. A2.

All or virtually all of at least the British Columbia residents had received compensation under workers' compensation. As a result, the British Columbia Workers' Compensation Board became subrogated to their claims, and their attorneys are acting with the authority of the British Columbia Workers' Compensation Board. A61.

The defendants, including petitioners here, are former manufacturers of asbestos products. A2. None is incorporated in Texas, and only one, National Gypsum, has its principal place of business in Texas, though each defendant is alleged to have done business in Texas or to have released products into the stream of commerce that reached Texas. Moreover, as the Texas Court of Appeals explained, "the circumstances that gave rise to the suit occurred in Canada,"

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may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

This statute abolished the common law doctrine of *forum non conveniens* in Texas. *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

A3, and "[a]ll damages were alleged to have occurred in Canada." A2. No plaintiff alleged any connection with Texas.

The defendants challenged jurisdiction and venue, but their motions were denied. A2. A motion for a stay on grounds of *forum non conveniens* was also denied. A64. *See* n.1, *supra.*

**B. The British Columbia Action.**

On November 10, 1989, after denial of the jurisdictional and venue motions in the Texas District Court, the defendants in the Texas action commenced an action against the plaintiffs in the Texas action, as well as the Workers' Compensation Board of British Columbia, in the Supreme Court of British Columbia. *Amchem Products, Inc., et al. v. Workers Compensation Board, et al.*, No. C895759 (B.C. S. Ct. Dec. 6, 1989) (reprinted at A59-98). The defendants in the Texas action sought (a) a declaration that British Columbia was the natural forum for the controversy raised in the Harrison County action; (b) a declaration that they were not liable to the plaintiffs in the Harrison County action; (c) an injunction restraining plaintiffs in the Harrison County action from seeking to restrain the defendants in that action from pursuing their British Columbia action; and (d) an injunction restraining plaintiffs in the Harrison County action from pursuing that action. A63-64.

The British Columbia court first granted an *ex parte* interim injunction restraining the British Columbia residents from seeking an anti-anti-suit injunction in the Texas action. A29-30. In response to that injunction, other plaintiffs in the Texas action, who were not British Columbia residents, obtained an *ex parte* temporary restraining order from the Harrison County court, prohibiting the defendants in that action from seeking from any Canadian court the relief obtained from the British Columbia court with respect to the British Columbia residents. A93.

Shortly after issuing the interim relief, Chief Justice Esson of the Supreme Court of British Columbia held an evidentiary hearing on the requests of the defendants in the Texas action for an injunction. On December 6, 1989, in a 52-page opinion, the Court entered an interlocutory injunction restraining the British Columbia claimants from proceeding in the Texas action. Observing that Texas "does not recognize the basic considerations of comity inherent in the doctrine of *forum non conveniens*," the Court held that the circumstances of the Texas action "should properly be described as oppressive" in violation of the law of British Columbia. A95.

The British Columbia court also condemned the attempt by the non-British Columbia plaintiffs in Texas to prevent the defendants in the Texas action from obtaining rulings from other Canadian courts as to the proper forum. It distinguished between an injunction, like that it had granted, designed to preserve its jurisdiction "to consider whether persons who are subject to the law of this province ought to be enjoined from suing elsewhere," and that sought by the plaintiffs in Texas, which was designed to prevent the British Columbia court from considering that question. A94. In other words, the injunction issued by the Harrison County court

> indicates unwillingness on the part of [that] court to permit the issue of oppression to be considered in the forum in which the claimants reside, and has thus gone beyond merely declining to consider the issue of *forum non conveniens* to take a positive step to prevent the defendants before it from obtaining a decision on that issue.

A95.

**C. The Appeal to the British Columbia Court of Appeal.**

On December 21, 1989, the British Columbia Court of Appeal granted leave to appeal. It heard four days of oral argument and, on November 5, 1990, unanimously upheld

the temporary injunction entered by the Supreme Court of British Columbia.

Writing for the Court, the Honourable Mister Justice Hollinrake first held that "British Columbia is the one and only natural forum for this action," there being " 'nothing to connect the action with Texas at all.' " A39, A40 (citation omitted). Specifically, the Court observed, the "acts and omissions which are the subject of the claims all occurred in Canada, the claimants are British Columbia residents, or were at the material times, and it was in British Columbia that they suffered the injury and were admitted to compensation." A40-41. Applying British Columbia law, Honourable Mister Justice Hollinrake concluded:

> Considering what I have described before as the somewhat tenuous jurisdiction of the Texas courts on the facts before us and my conclusion that British Columbia is the only natural forum for this action, I think the denial to the defendants in Texas . . . of even a hearing on the merits of a plea of *forum non conveniens*, albeit as a result of a legislative enactment as construed by the Texas court [*Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991)], is enough to tip the scales leading to a finding of oppression.

A44. The Court therefore affirmed the temporary injunction and directed the Supreme Court to set the issue down for trial. A48. The Honourable Chief Justice McEachern concurred but wrote separately to reiterate that British Columbia was the "obvious natural forum." A56. Leave to appeal this decision to the Supreme Court of Canada was granted on June 20, 1991.

**D. The Harrison County Injunction.**

On the same day that the British Columbia Court of Appeal affirmed the Supreme Court's injunction, Texas counsel to the Alberta, Manitoba, and New Brunswick plaintiffs in Texas, who were not subject to the British Columbia

injunction, obtained a second *ex parte* temporary restraining order from the Harrison County court. A2. This anti-anti-suit injunction restrained the Texas defendants from seeking anti-suit injunctions from any Canadian court with respect to the remaining Texas plaintiffs.

On November 19, 1990, the Texas court held a hearing on these plaintiffs' application for a preliminary injunction. The plaintiffs introduced as evidence only a copy of the opinion of the British Columbia Court of Appeal, a copy of the Texas Supreme Court opinion in *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991), and the affidavit and testimony of one of plaintiffs' counsel.

On this record, the Texas court enjoined the Texas defendants from pursuing

> any suit or action in any province of Canada or state or territory, which in anyway attempts to restrain or prohibit these Plaintiffs from pursuing their asbestos actions before this Honorable Court, or in anyway attempts to remove these asbestos cases from this Honorable Court to another jurisdiction . . . .

A19. To justify the order, the court first explained that in its opinion, "the Defendants herein, intend to appear in Alberta, Manitoba and New Brunswick courts and file actions of an injunctive nature and/or restrictive orders which would prohibit the Plaintiffs from proceeding to judgment in this Honorable Court as allowed by Texas law." A18. According to the court, any such action would

> violate the rights of the Plaintiffs to pursue their cause of action in a state court of Texas in direct conflict with Texas law; and unless Defendants are deterred from carrying out that intention, Plaintiffs will be without any adequate remedy at law to pursue their cause of action in the Texas state courts for injuries they have sustained as a result of Defendants' defective products.

A19. Though labelled "temporary," the injunction by its terms runs "until judgment in this cause is entered by this Court." A19. The injunction therefore finally determines the issue it addresses.

**E. The Appeal to the Court of Appeals For the Sixth Supreme Judical District of Texas at Texarkana.**

The defendants in the Texas action appealed the trial court's anti-anti-suit injunction, and the Court of Appeals for the Sixth Supreme Judicial District of Texas at Texarkana affirmed. *Owens-Illinois, Inc. v. Webb*, 809 S.W.2d 899 (Tex. Ct. App. 1991) (reprinted at A1-11). The Court of Appeals acknowledged that the "natural forum [for this action] would be Canada because the circumstances that gave rise to the suit occurred in Canada, and the plaintiffs are citizens of Canada." A3. However, citing the Texas Supreme Court's decision in *Dow Chemical Co.*, *supra*, and Tex. Civ. Prac. & Rem. Code Ann. § 71.031(a), the court held that in Texas a "trial court no longer has a right to decline jurisdiction in wrongful death and personal injury action[s] arising out of an incident in a foreign state or country." A4.

The Court of Appeals then considered principles of international comity, as expounded in *Gannon v. Payne*, 706 S.W.2d 304 (Tex. 1986), and *Hilton v. Guyot*, 159 U.S. 113 (1894). It reasoned, however, that the "trial court granted the injunction for the purpose of protecting its own jurisdiction, i.e., if the appellants were allowed to enjoin the appellees in a Canadian action from further proceedings, the Texas court would lose its ability to proceed with the case." A5-6. Because the trial court was thereby "protecting its own jurisdiction," the Court of Appeals found no violation of comity. A5.

In a supplemental opinion on application for rehearing, the Texas Court of Appeals rejected arguments under international law and international comity. It held, among other things, that its anti-anti-suit injunction did not violate the

principle of reasonableness limiting a state's jurisdiction to prescribe law. A9-10 (citing *Restatement (Third) of Foreign Relations Law* § 403(2) (1987)). The Court concluded by observing that "[t]he rule of international comity does not require that our courts roll over and play dead because another jurisdiction wishes us to do so." A10-11.

A second motion for rehearing was overruled without opinion on July 9, 1991, and the Texas Supreme Court dismissed defendants' appeal for want of jurisdiction on October 16, 1991. A12, A22.

**F. The Intervention of Additional Plaintiffs in the Harrison County Action.**

Since the issuance of the injunction that is the subject of this petition, more than 150 Canadian citizens, residents of Alberta, Manitoba, Nova Scotia, and even British Columbia, have joined in the action, bringing the total number of Canadian plaintiffs to more than 350. The trial court issued two additional anti-anti-suit injunctions on June 13, 1991 and November 27, 1991, which are on appeal in the Texas courts.

## REASONS TO GRANT THE WRIT

In the decision petitioners ask this Court to review, the Texas Court of Appeals affirmed an injunction by the District Court of Harrison County, Texas, that prohibits petitioners from bringing before any Canadian court the issue whether Canadian citizens may bring suit in Harrison County for injuries allegedly suffered in Canada. The Texas court issued the injunction even though it expressly recognized—as the British Columbia Court of Appeal had already held in a related action—that "[t]he natural forum would be Canada because the circumstances that gave rise to the suit occurred in Canada, and the plaintiffs are citizens of Canada." A3. Unsurprisingly, numerous additional plaintiffs from Canadian provinces have intervened in the Harrison County action and obtained similar injunctions, thereby preventing petition-

ers from seeking from the respective provincial courts the same ruling they obtained from the British Columbia Court of Appeal—that because Canada is "the one and only natural forum" for the action, A39, under Canadian law the Canadian plaintiffs should not be permitted to proceed in Texas.

The holding of the Texas Court of Appeals requires this Court's intervention for two reasons. First, the Texas Court of Appeals, while acknowledging that principles of international comity might otherwise apply, held that the supposedly absolute right afforded by Texas law to bring a wrongful death or personal injury action in a Texas court defeated any such principles. This Court should grant the writ to confirm, to the contrary, that principles of international comity form part of the federal common law that state courts are bound to apply, and that, at a minimum, those principles preclude an American court from seeking to prevent another sovereign's courts from determining the proper forum for the resolution of injuries suffered by that sovereign's citizens on that sovereign's soil.

Second, by prohibiting petitioners from even raising before a Canadian court the issue whether Canadian citizens may proceed with an action in Texas, the trial court of Harrison County, Texas, has effectively constituted itself the court of exclusive jurisdiction for any Canadian plaintiff who wishes to file an asbestos action there. This bold usurpation of the Canadian courts' authority to hear such controversies is an affront to the sovereignty of Canada that the United States cannot permit an individual State to perpetrate, but that only this Court can now prevent.

## I. THIS COURT SHOULD GRANT THE WRIT TO CONFIRM THAT PRINCIPLES OF INTERNATIONAL COMITY ARE AN ELEMENT OF FEDERAL COMMON LAW AND SET MINIMUM STANDARDS OF DEFERENCE THAT STATE COURTS MUST EXTEND TO THE ACTS OF A FOREIGN SOVEREIGN PRESCRIBING LAW APPLICABLE TO ITS NATIONALS.

### A. The Texas Court of Appeals Failed to Acknowledge That Federal Law Binding on the States Imposes Minimum Standards of Comity.

Since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), in which this Court held that there is "no federal general common law," the Court has recognized that there are nonetheless areas that require the development of a "specialized" federal common law. *See* Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964). This federal common law arises either pursuant to a congressional grant of jurisdiction, *e.g.*, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957), or as a result of the need for national uniformity in a given area, *e.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943). It is binding on the states pursuant to the supremacy clause. *See*, *e.g.*, *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423-27 (1964); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

The need for national uniformity is most compelling in matters touching on foreign relations. For example, the act of state doctrine precludes a court in the United States from passing on the validity of an "ac[t] of a governmental character done by a foreign state within its own territory and applicable there." *Restatement (Third) of the Foreign Relations Law of the United States* § 443 (1987); *see W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Sabbatino*, *supra*.

This Court has held that, as "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community," the doctrine "must be treated exclusively as an aspect of federal law." *Sabbatino*, 376 U.S. at 425. As a result, the act of state doctrine supplies a federal "principle of decision binding on federal and state courts alike." *Id.* at 427.[2]

Conversely, the Court has made plain that a state may not legislate in a manner that interferes with the national conduct of foreign affairs. In *Zschernig v. Miller*, 389 U.S. 429, 436-41 (1968), the Court invalidated the application of an Oregon statute that imposed a reciprocity requirement on the payment of legacies to foreign nationals. The Court explained that "the history and operation of this Oregon statute make clear that [it] is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id.* at 432.

For the reasons illustrated by *Sabbatino* and *Zschernig*, federal law also prescribes the minimum standards of deference that an American court must extend to the acts of a foreign sovereign having consequences within the United States.

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2 *See also Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979) (international trade) (nation must " 'speak[ ] with one voice when regulating commercial relations with foreign governments' ") (citation omitted); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (alien registration) ("federal power in the field affecting foreign relations [must] be left entirely free from local interference"); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (international negotiations and compacts) ("complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states"); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (treaty law) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."); *The Federalist*, Nos. 3-5 (J. Jay), 42 (J. Madison), 80 (A. Hamilton).

In an oft-repeated formulation, this Court defined that deference as a principle of international comity, determining "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. at 164; *see Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 543-46 & n.27 (1987). Given the potential for interference with our foreign relations posed by the refusal of state authorities, including state courts, to accord deference to the acts of a foreign sovereign in appropriate circumstances, it is clear that international comity raises "intrinsically federal" questions. *Sabbatino*, 376 U.S. at 427; *see First Nat'l City Bank*, 406 U.S. at 765 (opinion of Rehnquist, J.) (act of state doctrine "has its roots . . . in the notion of comity between independent sovereigns").[3] Uniform minimum standards of deference therefore arise as a matter of federal law.[4]

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3 This deference also qualifies as a principle of reasonableness limiting, as a matter of international law, a sovereign state's jurisdiction to prescribe. *See Restatement (Third) of Foreign Relations Law* § 403; *see also id.* comment a ("Some United States courts have applied the principle of reasonableness as a requirement of comity, that term being understood not merely as an act of discretion and courtesy but as reflecting a sense of obligation among states."). The classification of the requirement of deference as an obligation of international law reinforces its federal character, as it is well-settled that international law forms a part of federal common law. *Restatement (Third) of Foreign Relations Law* § 111(1) (international law is federal law and hence supreme over state law), § 112(2) (determination and interpretation of international law present federal questions). *See, e.g., The Paquete Habana*, 175 U.S. 677, 700 (1900) (international law is part of federal law).

4 Whether federal law also prescribes maximum standards of deference or, instead, permits a state to accord greater deference than federal law would require is a question not raised by this petition. *See* Westin & Born, *Applying the* Aerospatiale *Decision in State Court Proceedings*, 26 Colum. J. Transnat'l L. 297, 306-11 (1988).

In the decision below, the Texas Court of Appeals held to the contrary. It acknowledged that both federal and Texas law recognized principles of international comity. A4 (citing *Hilton*, *supra*, and *Gannon*, *supra*). It held, nevertheless, that because pursuant to Texas law "the trial court no longer has a right to decline jurisdiction in wrongful death and personal injury action[s] arising out of an incident in a foreign state or country," A4, the trial court had acted properly in entering its anti-anti-suit injunction in order to "protect[ ] its own jurisdiction." A5. In short, the Court of Appeals allowed a right it understood Texas law to afford to supersede principles of international comity, which it recognized as applicable but did not consider itself bound to apply.

The ruling of the Court of Appeals creates an intolerable situation. As this Court has recognized in the context of the closely related act of state doctrine,

> [i]f federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.

*Sabbatino*, 376 U.S. at 424. So, too, as to international comity: this Court must define the minimum standards of deference that state courts, no less than the lower federal courts, must accord the actions of a foreign sovereign having effects in this country. This Court should therefore grant the writ to confirm that federal law supplies the rule of decision as to principles of international comity.

### B. Once an American Court Has Determined That It Is Not the Natural Forum for a Controversy Before It, It Must Defer to a Foreign Court's Determination That Its Citizens May Not Bring Suit in That American Court.

By their very nature, anti-suit injunctions directed toward proceedings in a foreign jurisdiction raise "delicate questions

of comity." *Compagnie des Bauxites de Guinea v. Insurance Co. of North America*, 651 F.2d 877, 887 n.10 (3d Cir. 1981), *aff'd on other grounds sub nom. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, *cert. denied*, 457 U.S. 1105 (1982). Though typically addressing the parties, such injunctions operate as a practical matter to constrain the authority of foreign courts. *Id.* at 887. For this reason, they may be granted "only in the most compelling circumstances." *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984).

Here, the Texas Court of Appeals approved an injunction that prohibited petitioners from bringing before any Canadian court the issue whether Canadian citizens may maintain an action for alleged injuries suffered on Canadian soil in the District Court of Harrison County, Texas, with which neither the plaintiffs nor the controversy has any connection, and with which petitioners' only connection is their alleged amenability to suit there. The injunction effectively prevents any Canadian court from taking the action that the District Court assumed any Canadian court would take—directing its citizens to desist from pursuing their actions in Texas.

The Harrison County injunction violates principles of international comity for two reasons. First, "a [nation] has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory. . . ." *Restatement (Third) of Foreign Relations Law* § 402(2); *see Blackmer v. United States*, 284 U.S. 421 (1932) (power to subpoena national living abroad). A court, like a legislature, has jurisdiction to prescribe law. *Restatement (Third) of Foreign Relations Law* § 402 comment i. And encompassed within the jurisdiction to prescribe is the authority to determine in what forum the nation's citizens may pursue legal proceedings. *Laker Airways*, 731 F.2d at 926; *see also Dames & Moore v. Regan*, 453 U.S. 654, 686-87 (1981) (President has authority to require United States nationals to pursue claims against Iran in Iran-United States Claims Tribunal); *cf. Cole v. Cunningham*, 133 U.S. 107, 134 (1890) (upholding order of

Massachusetts court enjoining prosecution of New York action by Massachusetts citizen that Massachusetts court determined would undermine important Massachusetts policies).

Here, the Canadian plaintiffs in the Texas action have *no* connection to Texas. They neither reside nor do business there, and their cause of action did not arise there. Hence, it cannot even be said that there exists concurrent jurisdiction to prescribe the forum for suit, such that the Texas trial court would have an obligation to defer to the British Columbia courts only were it to determine that Canada's interest is—as is surely the case—"clearly greater." *Restatement (Third) of Foreign Relations Law* § 403(3); *see id.* comments d, e. Under these circumstances, principles of international comity required the Texas court to defer to the Canadian courts.

There is a second, independent reason why the Harrison County court had an obligation to defer. Competing anti-suit injunctions most frequently arise where both courts assert an interest in the subject matter of the controversy. For example, in *Laker Airways*, where the United States Court of Appeals for the District of Columbia Circuit affirmed an injunction prohibiting certain foreign defendants from joining in a British action intended to restrain Laker, a British company, from pursuing its antitrust action in the District Court, the American court had an interest in the application of the antitrust laws to conduct alleged to have occurred in the United States, and the British court had an interest in the conduct of a British national. 731 F.2d at 921-26. Here, by contrast, the Texas Court of Appeals did not assert *any* interest in the subject matter of the underlying controversy. Indeed, the Texas court readily acknowledged that "[t]he natural forum [for the action] would be Canada because the circumstances that gave rise to the suit occurred in Canada, and the plaintiffs are citizens of Canada." A3. Under these cir-

cumstances, too, principles of international comity required the Texas court to defer to the Canadian courts.[5]

This Court has previously noted the possibility that " 'Texas has constituted itself the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere else.' " *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 145 (1988) (quoting *id.*, 817 F.2d 307, 314 (5th Cir. 1987) (footnote omitted)). It has not, however, considered the possibility that Texas would insist on so constituting itself even over the objection of the foreign sovereign whose nationals had brought the suit and whose courts the Texas court conceded provided the only natural forum. Notwithstanding the evident sensitivity of anti-suit injunctions directed at foreign proceedings, the Texas Court of Appeals has plainly failed to heed this Court's admonition that "American courts . . . take care to demonstrate due respect . . . for any sovereign interest expressed by a foreign state." *Aerospatiale*, 482 U.S. at 546. This case therefore provides this Court with an opportunity to provide state and federal courts with necessary guidance as to the principles of international comity applicable to anti-suit injunctions.

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5 This conclusion is reinforced by the unavailability in Texas personal injury actions of the doctrine of *forum non conveniens*. *See Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991). The interests of the foreign jurisdiction will often be considered by the forum court on a motion for dismissal for *forum non conveniens*. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 (1981). The inability of a defendant in a Texas personal injury action to seek dismissal on grounds of *forum non conveniens* heightens the obligation of the Texas court to consider the foreign jurisdiction's interest pursuant to principles of international comity.

## II. THIS COURT SHOULD GRANT THE WRIT TO PREVENT THE AFFRONT TO CANADIAN SOVEREIGNTY THAT WILL RESULT FROM THE TEXAS TRIAL COURT'S USURPATION OF AUTHORITY TO DECIDE WHERE CANADIAN PLAINTIFFS MAY BRING SUIT TO REMEDY INJURIES ALLEGEDLY SUFFERED ON CANADIAN SOIL.

Not only is the Harrison County injunction manifestly unjust and unsupportable as a matter of international law and comity, but it offends Canadian sovereignty in the most fundamental way. This Court must intervene to remedy the affront.

There is no dispute in this action that all plaintiffs are Canadian residents and citizens, that none has any connection with Texas, and that the events underlying the suit occurred in Canada. There is no suggestion that the laws of the Texas plaintiffs' respective provinces do not provide a remedy or that the appropriate provincial courts are not available. Hence, as the Texas Court of Appeals recognized, Texas' only interest in this action is the availability to any plaintiff who wishes to sue there of section 71.031 of the Texas Civil Practice and Remedies Code—giving rise, it appears, to the special interest of "rural Harrison County, Texas, where asbestos litigation has, apparently, become a local growth industry." A56 (concurring opinion of Chief Justice McEachern).

Notwithstanding the absence of any cognizable interest in the action on Texas' part, the holding of the British Columbia Court of Appeal that these Canadian citizens should be required to pursue their suit in Canada, and the assumption by the Harrison County court that any other Canadian court would also so rule, the Harrison County injunction operates to establish that forum as the headquarters for Canadian asbestos litigation. The issuance of the second and third injunctions in the action below makes certain the prospect that as each additional plaintiff files, the Harrison County court will act to prevent the defendants from seeking a ruling

from a Canadian court as to the propriety of a suit in Texas by that Canadian national. The effect of the Harrison County injunction, therefore, is to oust the entire Canadian judicial system of its authority to hear that question, and, as a practical matter, to hear and determine the underlying liability actions. In short, Harrison County, Texas, has arrogated to itself the right to determine the future course of Canadian asbestos litigation.

This Court simply cannot allow such a sweeping usurpation of Canada's judicial authority to stand. As Chief Justice McEachern explained in his concurrence in the British Columbia Court of Appeal, this case raises an issue of global importance:

> Canada, and many other countries are in the process of forming or joining major trading blocks of nations in a world of greatly increased international trade. It is inevitable that contests regarding the situs of much important litigation will more frequently arise in the future than in the past.
>
> Plaintiffs, particularly in mass tort actions arising out of product manufacture and distribution, will naturally select the forum which offers the most advantages. This raises difficulties which transcend the issues in this case which, ultimately, the international legal community, and perhaps governments, may have to consider.

A52. Indeed, in the related context of choice-of-forum clauses, this Court has had occasion to make the same point, instructing American courts to eschew the "parochial concept that all disputes must be resolved under our laws and in our courts . . . ." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972); *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-31 (1985).

If the international trading system on which this and other countries' welfare depends is not to be seriously impeded by the chauvinistic concerns animating the decision of the Texas

Court of Appeals, this Court must exercise its authority to correct the decision below.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Sixth Supreme Judicial District of Texas at Texarkana to review that Court's order and opinion.

Respectfully submitted,

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January 14, 1992

# APPENDIX

In The
Court of Appeals
Sixth District of Texas at Texarkana

No. 6-90-085-CV

OWENS-ILLINOIS, INC., ET AL, Appellants

V.

MARILYN ROSE WEBB, ET AL, Appellees

On Appeal from the 71st Judicial District Court
Harrison County, Texas
Trial Court No. 88-0687

Before Cornelius, C.J., Bleil and Grant, JJ.
Opinion by Justice Grant

## OPINION

Owens-Illinois, et al, appeals from a temporary injunction obtained by Marilyn Rose Webb, et al,[1] in order to prevent Owens-Illinois from pursuing an injunction in a Canadian court. A single question is presented for review. Did the district court abuse its discretion by enjoining the appellants from pursuing an injunction in a foreign court which would prohibit the appellees from pursuing their Texas action? In short, we are dealing with an anti-anti-suit proceeding.

1 There are 32 appellants and 118 appellees.

The underlying personal injury asbestosis suit was filed in the 71st District Court in Marshall, Texas, on July 29, 1988. The plaintiffs are 216 Canadian citizens: 98 residents of British Columbia, 79 residents of Alberta, 37 residents of Manitoba and 2 residents of New Brunswick. All of these plaintiffs are appellees in this appeal except for the 98 residents of British Columbia. The defendants (appellants) are numerous corporate manufacturers and distributors of asbestos products. All damages were alleged to have occurred in Canada. Appellants have made various jurisdictional and venue challenges, each of which failed.

On November 10, 1989, the Texas defendants began a proceeding in a trial court of British Columbia seeking to enjoin the British Columbian plaintiffs in the Texas action from pursuing their personal injury claims in a Texas court. The Canadian trial court granted the requested injunction on December 6, 1989, and the British Columbia Court of Appeals affirmed this action (as to all 98 British Columbian plaintiffs) by written opinion on November 5, 1990.

During this time (on November 20, 1989), appellees' counsel obtained a temporary restraining order from the Texas district court restraining the appellants from seeking similar injunctions in the other Canadian provinces. Immediately after the rendition of an opinion by the British Columbia trial court, on December 7, 1989, appellees' counsel withdrew his application for an injunction in the Texas court, and he agreed to a stay in the Texas trial court pending final resolution of the British Columbia appeal. He also requested that appellants not pursue similar anti-suit injunctions in the other Canadian provinces during the appeal. Appellants complied with this request.

On the day that the British Columbia Court of Appeals rendered judgment against the British Columbian plaintiffs, appellees' counsel obtained an *ex parte* temporary restraining order from the Texas district court. The order prevented appellants from seeking similar injunctions in the Canadian courts of the provinces in which the remaining parties resided. After a hearing on November 19, 1990, the Texas court granted a temporary injunction prohibiting the appel-

lants from bringing an action in Canada to enjoin the appellees from proceeding with their Texas action. Appellants' appeal challenges this order.

On appeal from the entry of a temporary injunction, the sole question for determination by this Court is whether the trial court abused its discretion by issuing the temporary injunction. *See Iranian Muslim Organization v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981). The test for abuse of discretion is not whether, in the opinion of the reviewing court, the factors present an appropriate case for the trial court's action; rather, it is a question of whether the court acted without reference to any guiding rules or principles. *Downer v. Aquamarine Operators*, 701 S.W.2d 238 (Tex. 1985), *cert. denied*, 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 721 (1986).

This is not a case concerning jurisdiction. Both Canadian courts and Texas courts would have jurisdiction of the underlying suits. The natural forum would be Canada because the circumstances that gave rise to the suit occurred in Canada, and the plaintiffs are citizens of Canada; however, while the natural forum is a major consideration under the doctrine of *forum non conveniens*, the Supreme Court of Texas has ruled that the doctrine is not applicable to this type of proceeding. *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 688 (Tex. 1990).

The appellants contend in a supplemental brief that the real party in interest in these proceedings are the provincial workers' compensation boards. The workers' compensation boards are entitled to seek subrogation of the amounts paid in workers' compensation in any settlement or award obtained against third parties. This, however, has no bearing on the outcome of this proceeding.

Appellants have also urged the unfairness of applying Texas law instead of Canadian law. That issue is not before this Court at this time. Section 71.031(c) of the Texas Civil Practice and Remedies Code requires that the court shall apply the rules of substantive law that are appropriate under the facts of the case. TEX.CIV.PRAC. & REM. CODE ANN. 71.031(c) (Vernon 1986). The Texas Supreme Court in

*Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979), has ruled that all conflict cases sounding in tort will be governed by the "most significant relationship" test as enunciated in the American Law Institute's *Restatement (Second) of Conflicts*. The trial court will determine the appropriate law to be applied.

The doctrine of *forum non conveniens* gives discretionary power to the court to decline jurisdiction when convenience of parties and ends of justice would be better served if the action were brought and tried in another forum. This doctrine does not apply because it has been statutorily abolished for wrongful death and personal injury actions arising out of an incident in a foreign state or country. *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674; TEX.CIV.PRAC. & REM. CODE ANN. § 71.031(a) (Vernon 1986). According to the Supreme Court ruling in the *Dow Chemical* case, the trial court no longer has a right to decline jurisdiction in wrongful death and personal injury action arising out of an incident in a foreign state or country.

As the present case involves two sovereigns with concurrent jurisdiction to decide the controversy, the principle of comity requires that the trial court exercise its equitable power sparingly and only in very special circumstances. *Gannon v. Payne*, 706 S.W.2d 304, 306 (Tex. 1986). "Comity," in the legal sense, has been defined as neither a matter of absolute obligation, nor a matter of mere courtesy and good will. It is, however, the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1894); *see also Nowell v. Nowell*, 408 S.W.2d 550, 553 (Tex.Civ.App.-Dallas 1966, writ dism'd), *as cited in* BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

In the case of *Gannon v. Payne*, 706 S.W.2d 304, the Supreme Court held that the trial court abused its discretion in granting an anti-suit injunction involving the two sover-

eigns, Texas and Canada. The facts in the present case differ in two significant aspects from the facts in *Gannon*:

(1) In the *Gannon* case, the trial court had enjoined a Canadian citizen from bringing an action in Canada. In the present case, the trial court enjoined Texas resident corporations[2] from bringing a suit in Canada to enjoin Canadian citizens from bringing their action in Texas.

(2) In *Gannon*, the matter had already been litigated in Canada, and the Canadian citizen was asking for a declaratory judgment based upon the prior judgment. In the present case, not only has the matter not been litigated in Canada, there is no parallel suit pending,[3] nor is there any pending litigation at any stage of the proceeding in Canada on the substance of this litigation.

There are no precise guidelines for determining the appropriateness of an anti-suit injunction or for deciding whether comity should be invoked. The circumstances of each situation must be carefully examined to determine whether the injunction is required to prevent an irreparable miscarriage of justice. *Gannon v. Payne*, 706 S.W.2d at 307. Anti-suit injunctions have been issued by courts (1) to protect their own jurisdiction, (2) to prevent evasion of important public policies of the forum nation, (3) to prevent a multiplicity of suits, or (4) to protect a party from vexation or harassing litigation.

In the present case, it appears that the Texas trial court granted the injunction for the purpose of protecting its own jurisdiction, i.e., if the appellants were allowed to enjoin the appellees in a Canadian action from further proceedings, the

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2 Even if these corporations are chartered in other states, a corporation doing business in Texas is treated as a resident. *PPG Industries v. Continental Oil Co.*, 492 S.W.2d 297 (Tex.Civ.App.–Houston [1st Dist.] 1973, writ ref'd n.r.e.).

3 The injunction action in British Columbia initially requested a punitive damage award, but this request was struck by the court.

Texas court would lose its ability to proceed with the case.[4] A Texas court can enjoin its residents, be they corporate or individual, from seeking to enjoin the Texas court from proceeding with litigation over which it has jurisdiction. We do not find an abuse of discretion by the Texas trial court in protecting its jurisdiction under these circumstances.

Appellants next contend that the trial court abused its discretion by granting equitable relief to a party which did not come into court with clean hands. Before a party may seek an equitable remedy, that party must come before the court with clean hands. *Omohundro v. Matthews*, 161 Tex. 367, 341 S.W.2d 401 (1960). Appellants argue that they relied on the representations in a letter sent by appellees' counsel requesting that appellants not institute similar proceedings in the other provinces because the stay of proceedings which he was about to request would make such an action unnecessary. Without moving that the indefinite stay be lifted or modified, counsel then obtained a temporary restraining order *ex parte* on the date that the appellate decision was rendered. Appellants contend that this action violates the spirit of the *Texas Lawyer's Creed—A Mandate for Professionalism* III, 7,[5] and that equitable relief should not have been granted because appellees did not have clean hands.

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4 The trial court order reads as follows:

"It is the opinion of this Court that the Defendants intend to enforce injunctive and/or restrictive relief in Alberta, Manitoba and New Brunswick against these Plaintiffs as soon as possible and before the Court can render judgment in this cause; that if said Defendants carry out this intention, they will thereby alter the status quo intent to make ineffectual a judgment in favor of Plaintiffs and that Defendants are about to perform acts which violate the rights of the Plaintiffs to pursue their cause of action in a state court of Texas in direct conflict with Texas law; and that unless Defendants are deterred from carrying out that intention, Plaintiffs will be without any adequate remedy at law to pursue their cause of action in the Texas state courts for injuries they have sustained as a result of Defendants' defective products."

5 *Texas Lawyer's Creed—A Mandate for Professionalism* III, 7, states as follows: "I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond."

We have examined the letter to appellants' counsel.

The pertinent portion reads as follows:

> Further, I intend to move the Court in Texas to stay all proceedings in the *Webb* case until the British Columbia Court of Appeal hears our appeal of the decision of The Honourable The Chief Justice. Since I am taking the step of moving to stay all cases, including those from Alberta, Manitoba and New Brunswick, I would request that the asbestos companies take no further action at this time in those provinces. Given a stay of all cases, I do not believe any such action would be necessary.
>
> In any event, Scott Baldwin will move for a stay of all cases up to and including February 15, 1990, pending resolution of these matters by the British Columbia courts. If necessary, the stay will be extended.

Although the language appears to have been chosen to discourage them from pursuing similar injunctions in the Canadian provinces other than British Columbia, it does not extend beyond the resolution of the appeal process in British Columbia. Counsel apparently filed a motion for (and received) a temporary restraining order within hours after the rendition of the decision of the British Columbia Court of Appeals. Although counsel's action was abrupt, it could have been expected, and does not violate the specific terms of his communication. Under these circumstances, we cannot say that the clean hands doctrine applies. This contention is overruled. Appellants also contend that the district court's anti-anti-suit injunction erroneously covers three plaintiffs who are actually subject to the British Columbia court's anti-suit injunction. In their brief, appellees agree that this inclusion was erroneous as to these plaintiffs and state that this defect has been corrected. We assume that it has been corrected, but if it has not, we instruct the trial court to make the necessary corrections.

We have concluded that the trial court did not abuse its discretion by granting the temporary injunction. The order of the trial court is affirmed.

/s/ BEN Z. GRANT
Ben Z. Grant
Justice

April 9, 1991
Filed April 9, 1991

Publish

ON REHEARING

On rehearing, the appellants contend that this Court's opinion and holding violates five fundamental legal principles:

(1) The established Texas principle of statutory construction that courts should adopt a reasonable construction that will avoid a conflict and leave two potentially conflicting laws in effect;

(2) The recognized principle of international law that accords a sovereign power the right to control the conduct of its own nationals outside its territorial boundaries;

(3) The recognized principle of international law that among the fundamental rights of a sovereign state or nation is the right to control when, where, and how its own nationals pursue legal remedies;

(4) The general Texas rule that "statutes of a state *ex proprio vigore* have no extraterritorial effect"; and

(5) The established principle of Texas law that Texas courts should scrupulously adhere to principles of international comity when the other sovereign involved is a foreign nation.

The appellants have predicated their arguments on the basic premise that the Texas trial court entered an injunction

to prohibit the Canadian courts from doing certain acts. This basic premise is incorrect. The Texas trial court has not enjoined or prohibited the Canadian courts from doing anything. The Texas trial court enjoined its corporate citizens from taking certain actions in Canada that would have deprived the Texas trial court of its jurisdiction over a pending proceeding.

Under appellants' contention that this Court violated the rules of statutory construction, the appellants cite *City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17 (Tex. 1990); *Standard v. Sadler*, 383 S.W.2d 391 (Tex. 1964); and *Lopez v. State*, 756 S.W.2d 49 (Tex.App.-Houston [1st Dist.] 1988, pet. ref'd). These cases deal with statutory construction when two laws of Texas are in conflict with each other. The courts are to harmonize the different statutes of this State whenever possible so as to give effect to both enactments. *Standard*, 383 S.W.2d at 395. This is based upon the presumption that the Legislature did not intend to pass conflicting laws, but this is not a principle that must be applied between the laws of two different states or nations. When members of the Texas Legislature or Congress pass legislation, they are not concerned with whether the law is in harmony with all the laws of a foreign country, nor should they be. When a controversy involving two or more jurisdictions arises, the body of law generally referred to as "conflict of laws" is applied to determine which law or system is to govern in the particular case. As we stated in the original opinion, the trial court has not reached the point of determining what substantive laws will be applicable to this case.

In the next two points, the appellants urge that a sovereign power has the right to control the conduct of its own nationals outside its territorial boundary. That is exactly what our holding recognizes: the right of the State of Texas to control its own corporate citizens outside its territorial boundaries. This right was recognized by the United States Supreme Court in *Steel v. Bulova Watch Co.*, 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 319 (1952). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) provides that,

> Subject to § 403, a state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory.

The limitation expressed in Section 403 is that a state may not exercise its jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable. The exercise of jurisdiction in the present case is not unreasonable under the standards set out in Section 403(2).

For the next principle, the appellants contend that statutes of a state *ex proprio vigore* (by their or its own force) have no extraterritorial effect, *citing State of California v. Copus*, 309 S.W.2d 227, 229 (Tex. 1958). In the *Copus* case, the Supreme Court held that the Texas trial court had jurisdiction to enforce an action that occurred while the defendant was a citizen of California. Again, this rule deals with what substantive laws will be applied by the Texas court and must be decided with due regard for the current statutes and the appropriate conflict of law principles.

The last principle that the appellants contend was violated was a failure to adhere scrupulously to the principles of international comity, *citing Gannon v. Payne*, 706 S.W.2d 304 (Tex. 1986). In *Gannon*, the Supreme Court declared that the policy of allowing parallel court proceedings to continue simultaneously requires scrupulous adherence. The court invoked the doctrine of comity in holding that the Texas trial court could not issue an injunction prohibiting a foreign citizen from prosecuting an action in his home country. In *Gannon*, the Supreme Court pointed out that there was no evidence that the Canadian court had attempted to carve out exclusive jurisdiction in the case. In companion cases, the Canadian court has attempted to carve out exclusive jurisdiction by enjoining further proceedings on the substantive case in the State of Texas, and there is good reason to believe that the appellees being similarly situated in the present case would be treated the same way. The rule of international comity does not require that our courts roll over and play

dead because another jurisdiction wishes us to do so. We have pointed out the material difference between the present case and *Gannon*. Our ruling does not violate fundamental legal principles, but rather, it applies them.

The motion for rehearing is overruled.

/s/ BEN Z. GRANT
Ben Z. Grant
Justice

May 14, 1991
Filed May 14, 1991

Publish

IN THE SUPREME COURT OF TEXAS

October 16, 1991

| | | |
|---|---|---|
| NO. D-1463, | ) | |
| | ) | |
| OWENS-ILLINOIS, INC ET AL. | ) | |
| | ) | From HARRISON County, |
| v. | ) | 6th District |
| | ) | |
| MARILYN ROSE WEBB ET AL. | ) | |

Application of petitioners for writ of error to the Court of Appeals for the Sixth District, together with respondents' motion to dismiss said application for want of jurisdiction, filed herein on August 30, 1991, having been duly considered, it is ordered said motion to dismiss be granted, and accordingly, the application be, and hereby is, dismissed for want of jurisdiction.

It is further ordered that applicants, Owens-Illinois, Inc., et al., pay all costs incurred on this application.

No. 88-0687

| | | |
|---|---|---|
| MARILYN ROSE WEBB, ET AL. | : | In the District Court |
| | : | |
| VS. | : | Harrison County, Texas |
| | : | |
| AMCHEM PRODUCTS, INC., ET AL. | : | 71st Judicial District |

*TEMPORARY INJUNCTION*

THE STATE OF TEXAS )
COUNTY OF HARRISON )

TO: Combustion Engineering Co., Fibreboard Corporation and Pittsburgh Corning Corporation by and through their attorney of record, Mr. David L. Tolin and Lyn Stevens Weller, Wheelus & Green, 550 Fannin Street, 5th Floor, P.O. Box 350, Beaumont, Texas 77701;

Amchem Products Incorporated (Successor in Interest to Benjamin-Foster Company) Armstrong World Industries (Successor in Interest to Armstrong Cork Company) Flexitallic Gasket Company, GAF Corporation (Successor in Interest to Ruberoid Corporation), Keene Corporation (Successor in Interest to Baldwin-Ehret-Hill), National Gypsum Company, Turner-Newell, PLC, (Successor in Interest to Keasby & Mattison Corporation), and United States Gypsum Company, by and through their attorney of record, Mr. Greg Bevel, DeHay & Blanchard, Plaza of the Americas, 2500 South Tower, LB 201, Dallas, Texas 75301-2880

Empire Ace Insulation Manufacturing Corp. by and through its attorney of record, Mr. David M. Stagner, Stagner & Stagner, 315 S. Crockett Street, P.O. Box 2006, Sherman, Texas 75090-0360

Garlock Incorporated by and through its attorney of record, Mr. A.B. Connant, Jr. Whittenburg, Whittenburg & Schachter, 2960 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201

Georgia Pacific Corporation by and through its attorney of record, Mr. John H. Martin, Thompson & Knight, 3300 First City Center, 1700 Pacific Avenue, Dallas, Texas 75201

H.K. Porter Company, Inc., by and through its attorney of record, Mr. Don W. Kent, Cowles & Thompson, 280 One American Center, Tyler, Texas 75701

Manville Personal Injury Settlement Trust, by and through its attorney of record, Ms. Sharla Frost/Mr. Jim Moore, Holtzman & Urquhart, 9000 Two Houston Center, 909 Fannin, Houston, Texas 77010-1005

Owens-Corning Fiberglas Corporation, by and through its attorney of record, Mr. C. Edward Fowler, Jr., Bailey & Williams, 3500 First RepublicBank Plaza, 901 Main Street, Dallas, Texas 75202-3714

Owens-Illinois, Incorporated by and through its attorney of record, Mr. Larry Carlson, Baker & Botts, 2001 Ross Avenue, 800 Trammel Crow Center, Dallas, Texas 75201

W.R. Grace & Company, by and through its attorney of record, Mr. Hollye C. Fisk, Fisk & Fielder, 2710 Stemmons, 400 Tower North, Dallas, Texas 75207

In Cause No. 88-0687 in the District Court of Harrison County, Texas, 71st Judicial District, in which John Botwood, Gordon Butler, Winnerford Butler, Leo Iverson, Rudolf Jarosch, Margaret Jarosch, Roy Hamilton, Harley Lindquist, Joan Lindquist, Barbara Ponech, Ivan Risen, Stephanie Risen, Edwin Torwick, Floyd Wikstrom, Shirley Wikstrom, Joachim Winter, Kenneth Flaman, Mihaly Antal, Martha Brown, Christine Ruth Arial, Peter Arthur Henry Brown, Alois Cej, Aurelia Cej, Clara Mary Foss, Arlene Moen, Clair Foss, Arthur Foss, Jr., Rodger Foss, Dale Foss,

Ruby Andrew, Barbara James, James Andrew, Ronald Andrew, Lloyd Place, Ramon Simmons, Alex Batt, Diane V. Batt, Nicola Conforti, Chara Conforti, Hilda M. Spencer, Heather Joy Bryce, Randy William Spencer, Robert J. Butterworth, Lyla A. Butterworth, Lily Davidge, Diana Lynn Clifton, Roberta Clara Allenback, Andrew Heron, Jesse Heron, John R. Kennedy, Lillian Kennedy, Isabelle Meier, Keith David Stanley Meier, Wayne Martin Meier, Donald Ralph Meier, Neal Alan Meier, Michael Zukiwski, Lydia Zukiwski, Michael Tyrrill, Dale Beck, Laurie Beck, Clifford Helmer, Veronica I. Helmer, William R. Kostyn, Cathy M. Kostyn, Aurore Lea Kramps, Laurier Dennis Kramps, Yvette P. Koshman, Charlene G. Venier, Dianne M. Koehli, Collette J. Schofield, Constance V. McNeill, Valerie Cheryl Burke, Denis L. LaLonde, James Potter, Pat Potter, William H. Priestley, Betty Priestley, Earl Solberg and Shirley Solberg, (hereinafter, "Alberta Plaintiffs"); Richard Castelein, Karen Castelein, Elaine Castelein, Irene Doiron, Laurette Doiron, Renee Doiron, Dolores Doiron, John Doiron, Raymond Doiron, George Doiron, Dannell Bazen, Janet Bazen, Cloryl Bazen, June McDonald, Shannon McDonald, Prudence Dabe, Sandra McCullen, Sheila McDonald, Shelly Shaw, Roland Schmidtke, Margaret Schmidtke, Peter Nedecky, Mary Nedecky, Paul Bohemier, Rachel Marie Bohemier, Gladys Mary Jones, Kyra Knight, Warren Jones, Lance Jones, Wayne Jones, Shelly Broesky, Emily Mae Jones, Gerritt Denboer and Korstiana Denboer, Joseph LaRocque and wife, Denise LaRocque (hereinafter "Manitoba Plaintiffs"); and Arthur Sonier and Evelyn Sonier (hereinafter "New Brunswick Plaintiffs") are Plaintiffs and have filed a motion that you be enjoined as hereinafter set forth, the Court has duly made its Order that Plaintiffs are now entitled to such relief.

NOW, THEREFORE, YOU ARE COMMANDED forthwith to desist and refrain from taking any steps, directly or indirectly, to obtain or enforce any injunction, direction, ruling, judgment or other order; or instigating, beginning or otherwise pursuing any suit or action in any province of Canada or state or territory, which in any way attempts to restrain or

prohibit these Plaintiffs from pursuing their asbestos actions before this Honorable Court, or in any way attempts to remove these asbestos cases from this Honorable Court to another jurisdiction until judgment in this cause is entered by this Court.

YOU ARE FURTHER COMMANDED to appear at a trial on the merits of this cause on the 22nd day of July, 1991 at 9:00 o'clock a.m.

This writ is returnable at or before 10:00 o'clock a.m. of the Monday next after the expiration of twenty (20) days from the date of service hereof.

ISSUED on this the 21st day of November, 1990, to certify which witness my hand and seal of office.

BETTY CAWOOD, CLERK
District Court of Harrison
County, Texas
71st Judicial District

By: /s/ BETTY [ILLEGIBLE]
Deputy

NO. 88-0687

| | |
|---|---|
| MARILYN ROSE WEBB, ET AL | * IN THE DISTRICT COURT |
| VS. | * HARRISON COUNTY, TEXAS |
| AMCHEM PRODUCTS, INC., ET AL | * 71ST JUDICIAL DISTRICT |

*ORDER*

The Petition of John Botwood, Gordon Butler, Winnerford Butler, Leo Iverson, Rudolf Jarosch, Margaret Jarosch, Roy Hamilton, Harley Lindquist, Joan Lindquist, Barbara Ponech, Ivan Risen, Stephanie Risen, Edwin Torwick, Floyd Wikstrom, Shirley Wikstrom, Joachim Winter, Kenneth Flaman, Mihaly Antal, Martha Brown, Christine Ruth Arial, Peter Arthur Henry Brown, Alois Cej, Aurelia Cej, Clara Mary Foss, Arlene Moen, Clair Foss, Arthur Foss, Jr., Rodger Foss, Dale Foss, Ruby Andrew, Barbara James, James Andrew, Ronald Andrew, Lloyd Place, Ramon Simmons, Alex Batt, Diane V. Batt, Nicola Conforti, Chara Conforti, Hilda M. Spencer, Heather Joy Bryce, Randy William Spencer, Robert J. Butterworth, Lyla A. Butterworth, Lily Davidge, Diana Lynn Clifton, Roberta Clara Allenback, Andrew Heron, Jesse Heron, John R. Kennedy, Lillian Kennedy, Isabelle Meier, Keith David Stanley Meier, Wayne Martin Meier, Donald Ralph Meier, Neal Alan Meier, Michael Zukiwski, Lydia Zukiwski, Michael Tyrrill, Dale Beck, Laurie Beck, Clifford Helmer, Veronica I. Helmer, William R. Hostyn, Cathy M. Hostyn, Aurore Lea Kramps, Laurier Dennis Kramps, Yvette P. Koshman, Charlene G. Venier, Dianne M. Koehli, Collette J. Schofield, Constance V. McNeill, Valerie Cheryl Burke, Denis L. LaLonde, James Potter, Pat Potter, William H. Priestley, Betty Priestley, Earl Solberg and Shirley Solberg, Richard Castelein, Karen Castelein, Elaine Castelein, Irene Doiron, Laurette Doiron, Renee Doiron, Dolores Doiron, John Doiron, Raymond Doiron, George Doiron, Dannell Bazen, Janet Bazen, Cloryl Bazen,

June McDonald, Shannon McDonald, Prudence Dabe, Sandra McCullen, Sheila McDonald, Shelly Shaw, Roland Schmidtke, Margaret Schmidtke, Peter Nedecky, Mary Nedecky, Paul Bohemier, Rachel Marie Bohemier, Gladys Mary Jones, Kyra Knight, Warren Jones, Lance Jones, Wayne Jones, Shelly Broesky, Emily Mae Jones, Gerritt Denboer and Korstiana Denboer, Joseph LaRocque and wife, Denise LaRocque, Arthur Sonier and Evelyn Sonier, Plaintiffs in the cause, for a Temporary Injunction came on regularly for hearing this day, due notice having been given.

Upon considering the pleadings, the evidence received and the argument of counsel, the Court finds and concludes that the Plaintiffs have shown a probable right to recover and that Plaintiffs will suffer irreparable harm and injury if the Defendants Amchem Products, Inc. (Successor in Interest to Benjamin Foster Co.), Armstrong World Ind., Inc. (Successor to Interest to Armstrong Cork, Inc.), Combustion Engineering, Inc., Eagle-Picher Industries, Inc., Empire Ace Insulation Manufacturing Corp., Fibreboard Corp., Flexitallic Gasket Co., GAF Corp., (Successor in Interest to Ruberoid Corp.), Garlock, Inc., Georgia-Pacific Corp., H.K. Porter Company, Inc., Keene Corp., (Successor in Interest to Baldwin-Ehret-Hill Corp.), Manville Personal Injury Trust, National Gypsum Company, Owens-Illinois, Inc., Owens-Corning Fiberglas Corporation; Pittsburg-Corning Corp., Turner & Newell, PLC. (Successor in Interest to Keasby-Mattison Corp.), United States Gypsum, Inc., and W.R. Grace Company, or anyone acting for and on their behalf, take any steps directly or indirectly, to obtain or enforce any injunction, direction, ruling, judgment or other order, or to instigate or otherwise pursue any suit or action in any province of Canada or state or territory which in anyway attempts to restrain these Plaintiffs from pursuing their asbestos actions in this Honorable Court. It is further the opinion of this Court that the Defendants herein, intend to appear in Alberta, Manitoba, and New Brunswick courts and file actions of an injunctive nature and/or restrictive orders which would prohibit the Plaintiffs from proceeding to judgment in this Honorable Court as allowed by Texas law. It is

the opinion of this Court that the Defendants intend to enforce injunctive and/or restrictive relief in Alberta, Manitoba and New Brunswick against these Plaintiffs as soon as possible and before the Court can render judgment in this cause; that if said Defendants carry out this intention, they will thereby alter the status quo intent to make ineffectual a judgment in favor of Plaintiffs and that Defendants are about to perform acts which violate the rights of the Plaintiffs to pursuant their cause of action in a state court of Texas in direct conflict with Texas law; and that unless Defendants are deterred from carrying out that intention, Plaintiffs will be without any adequate remedy at law to pursue their cause of action in the Texas state courts for injuries they have sustained as a result of Defendants' defective products.

IT IS THEREFORE ORDERED that Defendants herein be, and are hereby commanded forthwith to desist and refrain from taking any steps, directly or indirectly, to obtain or enforce any injunction, direction, ruling, judgment or other order; or instigating, beginning or otherwise pursuing any suit or action in any province of Canada or state or territory, which in anyway attempts to restrain or prohibit these Plaintiffs from pursuing their asbestos actions before this Honorable Court, or in anyway attempts to remove these asbestos cases from this Honorable Court to another jurisdiction until judgment in this cause is entered by this Court.

IT IS FURTHER ORDERED that trial on the merits of this cause is Ordered set for 22nd day of July, 1991.

The Clerk shall forthwith, on the filing by Plaintiffs of the Bond hereinafter required, and on approving the same according to the law, issue a Temporary Injunction in conformity with the law and the terms of this Order.

This Order shall not be effective unless and until the Plaintiffs execute and file with the Clerk a bond in conformity with the law in the amount of FIVE HUNDRED AND NO/100 DOLLARS ($500.00).

SIGNED this 20th day of November, 1990.

/s/ BONNIE LEGGAT
JUDGE PRESIDING

**The order of the Texas Court of Appeals, overruling the motion for rehearing, is in the form of an opinion, dated May 14, 1991, and is reproduced in the Appendix at A8-11.**

*Court Of Appeals*
*Sixth District*
*State of Texas*

CHIEF JUSTICE
WILLIAM J. CORNELIUS

JUSTICES
CHARLES BLEIL
BEN Z. GRANT

CLERK
TIBBY THOMAS

BI-STATE JUSTICE BUILDING
100 NORTH STATE LINE
AVENUE #20
TEXARKANA, TEXAS 75501
903/798-3046

July 9, 1991

Hon. Greg Bevel
DeHay & Blanchard
Plaza of the Americas
2500 South Tower, LB 201
Dallas, TX 75201-2880

Hon. Dennis Chambers
Atchley,Russell,Waldrop,HlavinkA
P. O. Box 5517
Texarkana, TX 75505

Hon. Larry D. Carlson
Baker & Botts
800 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201

Hon. Scott Baldwin, Jr.
Baldwin & Baldwin
P. O. Drawer 1349
Marshall, TX 75670

Hon. John Martin
Hon. G. Luke Ashley
Thompson & Knight
3300 First City Center
1700 Pacific Avenue
Dallas, TX 75201

Hon. D. Mark Davis
Bailey and Williams
3500 NCNB Plaza
901 Main Street
Dallas, TX 75202-3714

Hon. Gene M. Williams
Mehaffy & Weber
P. O. Box 18
Beaumont, TX 77004

RE: Case No. 06-90-00085-CV
Trial Court No. 88-0687

Style: Owens-Illinois, Inc., Et Al
v. Marilyn Rose Webb, Et Al

The Court entered its order this date in the referenced proceeding whereby Appellants' Second Motion for Rehearing was **OVERRULED**.

PLEASE TAKE DUE NOTICE HEREOF.

Respectfully yours,
Tibby Thomas, Clerk

By /s/ Lynda Poore
Deputy

COURT OF APPEAL

Nos. CA011728
CA011731
CA011732
Vancouver Registry

BETWEEN: CA011728

T&N plc,

PLAINTIFF
(RESPONDENT)

AND:

WORKERS COMPENSATION BOARD

DEFENDANT
(APPELLANT)

AND:

CASSIAR MINING CORPORATION and others

DEFENDANTS

BETWEEN: CA011731

AMCHEM PRODUCTS INCORPORATED, and others

PLAINTIFFS
(RESPONDENTS)

AND:

CASSIAR MINING CORPORATION and others

DEFENDANTS

BETWEEN: CA011732

THE FLINTKOTE COMPANY

PLAINTIFF
(RESPONDENT)
(APPELLANT BY CROSS APPEAL)

AND:

WORKERS' COMPENSATION BOARD

DEFENDANT
(APPELLANT)
(RESPONDENT BY CROSS APPEAL)

AND:

PAUL AMBROSE and others

DEFENDANTS

---

**REASONS FOR JUDGMENT**

**OF**

**THE HONOURABLE MR. JUSTICE HOLLINRAKE**

---

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Taggart
The Honourable Mr. Justice Hollinrake

Counsel for the Appellants: J.J. Camp, Q.C., P.G. Foy and D.P. Church

Counsel for the Respondent Amchem Products Incorporated: B. Williams, Q.C. and T. Kowalchuk

Counsel for the Respondent T&N plc: J. Macaulay, Q.C. and K. Affleck

Counsel for Respondent The Flintkote Company: R. G. Ward and S. E. Fraser

Place and Date Heard: Vancouver, B.C. March 20, 21, 22, 23, 1990

Place and Date of Judgment: Vancouver, B.C.
November 5, 1990

In this case the plaintiffs/respondents applied before the Chief Justice of the Supreme Court to enjoin the defendants/appellants, other than Cassiar Mining Corporation, from proceeding with litigation pending in the State of Texas in which the defendants here are plaintiffs and the plaintiffs here are defendants.

The decision of the Chief Justice is reported at 42 B.C.L.R. (2d) 77.

In result the injunction was granted on terms. Those terms required the plaintiffs to undertake:

1. That, should the claimants or any of them bring action in British Columbia in relation to the matters now being sued upon in Texas, the asbestos companies will attorn to the jurisdiction of this court and will forthwith instruct solicitors here to accept service of any process issued against them by the claimants and will, in any such action, make diligent efforts to assist in having such action or actions brought to trial at an early date.

2. That in any such action or actions, any judgment rendered in favour of the claimants will be given full faith and credit and be as enforceable (subject to rights of appeal) as though rendered in the District court, Harrison County, Texas, 71st Judicial District, United States of America.

3. That evidence already obtained by lawyers through pre-trial depositions and documentary discovery in Action No. 88-0687 in the aforesaid District Court of Harrison County may be used in a British Columbia action brought by the Defendants presently named in the aforesaid Supreme Court Action No. C895759, to the same extent as such evidence could be utilized in the District Court of Harrison County.

I note at the outset of these reasons that during the course of the hearing before this Court the plaintiffs gave to the defendants the following undertaking:

> That should any of the claimants bring action in British Columbia in relation to the matters sued upon in Texas in action no. 88-0687, District Court, Harrison County, Texas, 71st Judicial District, U.S.A., within 90 days of the final disposition of the asbestos companies' application for an injunction restraining the claimants from proceeding in the said Texas action, none of the asbestos companies will raise in defence to such an action, any limitation period which, by virtue of British Columbia legislation, have accrued or which may hereafter accrue thereby between the date the claimant's action was filed in Texas and the date of bringing action in British Columbia and all asbestos companies specifically waive any defence based upon the accrual of such a limitation period.

The claimants referred to in this undertaking are the appellants in this court.

I turn now to the factual background.

In July, 1988 an action was commenced by a number of individuals in the Texas District Court, Harrison County, Texas, 71st Judicial District against a number of corporate bodies alleging negligence by reason of the defendants' failure to warn of the health risks associated with the use of asbestos and claiming damages arising from the inhalation of asbestos fibres. The original complaints alleged that all acts or omissions occurred in British Columbia, although the complaint has since been amended to allege exposure to asbestos and negligence arising in other jurisdictions in Canada, Texas and Yugoslavia.

Since the Texas action was commenced, additional plaintiffs and intervenors have been added. At this time there are one hundred and ninety-four plaintiffs of whom approximately one hundred are British Columbia residents or incurred the damages complained of while resident and work-

ing in British Columbia (the "claimants"). Some of these claimants are the injured parties. In some cases the injured party has died and those claims are being advanced by dependents and administrators.

The Workers' Compensation Board is not a party to the Texas action but is the *dominus litis* in respect of claims to which it is subrogated by reason of the receipt by the claimants of disability payments and death benefits pursuant to the *Workers' Compensation Act*. It also has a subrogated claim to the extent that it is financing the Texas litigation. However, any damages received, as a result of the Texas action, which exceed the Board's subrogated claim will be paid to the claimants.

There are thirty-three defendants in the Texas action whose common feature is that they engage, or have engaged, in the manufacture and supply of asbestos (the "asbestos companies"). Most of the asbestos companies are American corporations and although none were incorporated in Texas one has a principal office in Texas and another has a subsidiary with a principal place of business in Texas. However, one defendant, Carey Canada Inc., is a Quebec company and another defendant, T&N plc, is an English company.

It is alleged that all of the asbestos companies do business in Texas and that their products are sold and used in that state. Jurisdiction and venue is asserted to flow from the provisions of the *Texas Civil Remedies Code*.

In respect of the claim against T&N plc, it alleges that it was included in the Texas action as a successor in interest to a Pennsylvania company, Keasbey & Mattison Company. Keasbey & Mattison Company had a licensing agreement with one of T&N plc's subsidiaries to market a spray asbestos insulation product in the United States and Panama. Keasbey & Mattison Company did not market that product in Canada.

The Texas action has been dismissed as against two asbestos companies, Grefco Incorporated and A.P. Green Services. Two other asbestos companies, Babcock & Wilcox Company and Garlock Inc. have settled and another asbestos company, Raymark Industries Inc. is a bankrupt.

Most of the asbestos companies filed special appearances only or motions to challenge jurisdiction and venue in Texas and to have the Texas action stayed on the basis of *forum non conveniens*. It was argued on behalf of the claimants that this doctrine is not part of the Texas law pursuant to a Texas Court of Appeal decision, *Alfaro v. Dow Chemical*, 751 S.W. 2d 208 (Tex. Civ. App. Houston, 1988, Writ pending). In December 1988 Judge Baxter of the Texas District Court dismissed the challenges to jurisdiction but did not rule on the *forum non conveniens* issue. On July 14, 1989 Judge Leggatt of the Texas District Court dismissed, without reasons, the asbestos companies motions on the *forum non conveniens* issue. In the fall of 1989 the Texas District Court denied the asbestos companies motion to reconsider and the Texas Supreme Court refused to issue a writ of mandamus against Judge Leggatt in respect of the *forum non conveniens* issue. At this point the asbestos companies claim they had exhausted all pre-trial challenges to jurisdiction and challenges based on *forum non conveniens*.

In September 1989 Judge Leggatt made a scheduling order setting a December 18, 1989 trial date for five plaintiffs' actions, including two of the original nine plaintiffs. An Order was also made that all third parties had to be added to the action by October 10, 1989. Subsequently, during October and November 1989 depositions were taken in Vancouver and Houston which disclosed potential claims for contribution/contributory negligence against the Board, "employers" under the *Workers' Compensation Act* and possibly other Canadians and for contribution/indemnification against Cassiar Mining Corporation. However, the asbestos companies were out of time to add third parties to the Texas action and they also claim that the Texas court would not have jurisdiction over those parties in any event.

On November 10, 1989 the within actions were commenced by filing Writs of Summons and Statements of Claim.

*The British Columbia Actions*

Twenty-eight of the asbestos companies are plaintiffs in the three actions being considered here. Two asbestos companies, T&N plc and The Flintkote Company, have commenced separate actions while the remaining twenty-six asbestos companies are plaintiffs in the third action.

Chief Justice Esson in his Reasons for Judgment dated December 6, 1989 noted that none of these asbestos companies had any connection with British Columbia.

In addition to naming all the plaintiffs in the Texas action as defendants in the British Columbia action the asbestos companies included Workers' Compensation Board and Cassiar Mining Corporation as defendants. A claim for contribution and/or indemnification was advanced against those parties on the basis of breach of statutory duties against the Board and negligence in connection with the mining of asbestos in British Columbia against Cassiar Mining Corporation.

The asbestos companies sought:

— a declaration that British Columbia is the natural forum for a trial of the matters raised in the Texas action;

— a declaration that the asbestos companies are not liable to the British Columbia claimants in respect of any of the matters raised in the Texas actions;

— an injunction restraining the claimants from taking any step in Texas to obtain an order enjoining the asbestos companies from seeking the relief claimed in this action;

— an injunction restraining the claimants from further prosecuting the Texas actions; and

— damages based on "abuse of process" of this Court in bringing the Texas actions.

On November 10, 1989 Mr. Justice Cowan (B.C.S.C.) granted the asbestos companies an ex parte interim injunction restraining the claimants from taking any steps in Texas that

would prevent the asbestos companies proceeding with an interlocutory injunction application in British Columbia and made an order for substitutional service. On November 16, 1989 Chief Justice Esson denied the defendant's motion to set aside substitutional service (Reasons for Judgment issued November 20, 1989) and adjourned the interlocutory injunction application to November 21, 1989.

It became apparent during the November 16 hearing that forty of the defendants did not reside in British Columbia and that their claims had no connection with this Province or the Workers' Compensation Board (the "non-British Columbia claimants"). Counsel for the asbestos companies conceded that the injunction sought would not enjoin those defendants if they were in fact not connected with British Columbia.

On November 20, 1989 the non-British Columbia claimants obtained, in Texas, an anti anti-suit injunction ("Temporary Restraining Order") restraining the asbestos companies from taking any steps in other provinces to remove the non-British Columbia claimants' cases from the Texas courts. This Order expired on December 8, 1989.

On November 21, 1989 the interlocutory injunction application was heard by Chief Justice Esson together with a Workers' Compensation Board motion to strike out the "abuse of process" and damage claims made by the asbestos companies. Judgment was reserved.

On December 6, 1989 Chief Justice Esson granted the interlocutory injunction restraining the British Columbia claimants from proceeding in the Texas action on terms. Those terms are set out above. The ex parte injunction granted by Mr. Justice Cowan on November 10, 1989 was continued until further order. In addition, the motion to strike out the claims relating to abuse of process and damages was granted.

Leave to appeal Chief Justice Esson's decision was granted on December 21, 1989 and heard by the Court of Appeal in March 1990. The defendants, Workers' Compensation Board and the claimants, appealed the granting of the interlocutory

injunction and the asbestos companies appealed the striking out of their claims relating to abuse of process and damages.

The defendants now appeal the order granting the injunction and the plaintiffs cross-appeal the order striking out the claim for damages for abuse of process. At the hearing before us only the plaintiff Flintkote pursued the cross-appeal.

I note here that the order striking out the abuse of process claim in the statement of claim was entered September 11, 1990.

I say at the outset of these reasons that in my opinion Chief Justice Esson did not err in principle or otherwise in any manner that could result in the defendants/appellants appeal being successful. I can see nothing in the reasons of the Chief Justice to permit this Court to interfere with the discretion he exercised in granting the injunction on the terms he did.

However, I do have a somewhat different view as to the issue of natural forum and the significance or otherwise of the want of any doctrine of *forum non conveniens* in the State of Texas and I propose to set those out in these reasons.

The first matter that should be dealt with in this Court is whether principles to be applied to anti-suit injunctions as set out in the judgment of the Privy Council in *SNI Aérospatiale v. Lee Kui Jak and another*, [1987] 3 All E.R. 510 should be followed in this jurisdiction. There are many cases in this jurisdiction dealing with the principles applicable to the doctrine of *forum non conveniens*. In most of the cases stays were applied for and not an anti-suit injunction. However, in my view, the principles applied in the stay cases must be considered as a guide when considering the principles to be applied to an application for an anti-suit injunction like the one before us.

In his judgment the Chief Justice referred to these cases:

> *The Atlantic Star*, [1974] A.C. 436; [1973] 2 All E.R. 175;

*MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795; [1978] 1 All E.R. 625;

*Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C.; 210; [1977] 3 All E.R. 803;

*Castanho v. Brown & Root (U.K.) Ltd. and Another* [1981] A.C. 557, [1981] 1 All E.R. 143;

*British Airways Board v. Laker Airways Ltd.* [1984] A.C. 58, 3 All E.R. 39, [1985];

*The Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460; [1986] 3 All E.R. 843;

*SNI Aerospatiale v. Lee Kui Jak* [1987] 3 All E.R. 510 (PC);

and said (p.84 B.C.L.R.):

> Of those cases, only *Castanho v. Brown* and *SNI Aerospatiale* deal directly with anti-suit injunctions. In the absence of any decisions binding on this court I will accept those two cases as being of the most highly persuasive authority.

and again (p.85 B.C.L.R.):

> Because of the close link between the principles applicable to the anti-suit injunction and those applicable to granting a stay of an action within the jurisdiction, there are decisions of our Court of Appeal which have some application to the issues here. The question of stay has been considered in a number of recent decisions including *Rogers v. Bank of Montreal* (1984), 49 B.C.L.R. 85; *Avenue Properties Ltd. v. First City Development Corporation Ltd. et al.* (1986) 7 B.C.L.R. (2d) 45; *First City Investments Inc. et al. v. Shrum, Liddle and Hebenton et al.* (1988), 26 B.C.L.R. (2d) 46; *Canadian Commercial Bank v. Charles C. Carpenter et al. and Bennett Jones et al.* (B.C.C.A. No. 10415 Van. Reg.—judgment pronounced October 5, 1989).

To this list of British Columbia cases I add:

> *Ecco Heating Products Ltd. v. J. K. Campbell & Associates Limited et al.*, B.C.C.A. No. CA011582 Van. Reg., June 28, 1990;
>
> *Cormie v. Western Report et al.*, B.C.C.A. No. CA010560 Van. Reg., July 26, 1990.

The law as to the principles governing the court in a case such as this is not settled in British Columbia. That law has been rendered more certain in England with the judgment of the Judicial Committee of the Privy Council in the *SNI* case. Prior to that case it was thought that the principles applied were similar whether the remedy sought was a stay of English proceedings or an anti-suit injunction restraining a plaintiff from proceeding in a foreign jurisdiction: see Lord Scarman in *Castanho*, A.C. pp. 574-5. In the *SNI*, Judicial Committee of the Privy Council held that the principles governing stays are not the same as those governing anti-suit injunctions.

In my opinion this Court should look to the principles enunciated by Lord Goff in the *SNI* case and adopt them unless there is authority in this Court that would compel a contrary conclusion. On a review of the cases in the British Columbia Supreme Court and British Columbia Court of Appeal one sees that the particular facts of those cases led to an emphasis on a particular aspect of what was said to be the principles governing stay applications. In the *Ecco Heating* case, Taylor, J.A. referred to a number of stay cases both in England and in this jurisdiction. I reproduce here a substantial portion of that judgment. I do so because with respect I agree with everything said in it and I could not put it better if as well:

> The matters to be considered in deciding whether a court should stay proceedings in favour of another forum have been discussed in a line of English cases including *St. Pierre v. South American Stores Ltd.*, [1936] 1 K.B. 382 (C.A.), *The Atlantic Star*, [1973] 2 All E.R. 175 (H.L.), *MacShannon v. Rockware Glass Ltd.* [1978] 1

All E.R. 625 (H.L.), *Castanho v. Brown & Root (U.K.) Ltd.* [1980] 3 W.L.R. 991 (H.L.), *The Abidin Daver* [1984] A.C. 398 (H.L.), and *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] A.C. 460 (H.L.). The English jurisprudence has recently been considered in decisions of this court commencing with *Rogers v. Bank of Montreal* (1984), 49 B.C.L.R. 85, and including *Avenue Properties Ltd. v. First City Development Corporation Ltd.* (1986), 7 B.C.L.R. (2d) 45, *First City Investments Inc. v. Shrum, Liddle & Hebenton* (1988), 26 B.C.L.R. (2d) 46, *Patseas v. Castelo* (1988), 54 D.L.R. (4th) 573, and, most recently, *Canadian Commercial Bank v. Carpenter* (1989), 39 B.C.L.R. (2d) 312.

In Avenue Properties, Madam Justice McLachlin followed an approach adopted in *Rogers*, and employed the so-called "modified English rule" laid down by the House of Lords in *MacShannon v. Rockware Glass Ltd.*, but said (at p. 52):

> The foregoing requirements provide helpful guides. However, the court should not adopt an overly legalistic approach to them. It must always be remembered that the decision as to whether or not to decline jurisdiction under Rule 14(6) is essentially a discretionary matter. What is at stake is, on the one hand, a plaintiff's right to bring his action in the forum of his choice and, on the other hand, the defendant's right not to be subjected to suffer severe injustice by reason of those proceedings. The test thus involves a balancing of interests, the critical equation being between "any advantage to the plaintiff and any disadvantage to the defendant"
> . . .

Subsequent to the decision in *Avenue Properties*, the House of Lords in *Spiliada* reconsidered the position it had adopted in *MacShannon* and effectively opted for the test of "*forum conveniens*" rather than the "modified English rule". This raised a question as to whether

the latter rule was, and should continue to be considered as, the appropriate test in this jurisdiction.

In *First City Investments Inc. v. Shrum, Liddle & Hebenton*, supra, Mr. Justice Hinkson, writing for the Court, noted that counsel had referred to both *Avenue Properties* and *Spiliada* and quoted Lord Goff in *Spiliada* (at p. 50):

> Since the question is whether there is some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in *MacShannon's* case, [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense". Having regard to the anxiety expressed in your Lordships' House in the *Societe du Gas* case, [1926] S.C. (H.L.) 13, concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in the *Abidin Daver*, [1984] 1 A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection".

Mr. Justice Hinkson makes the comment with respect to this passage that it is "consistent with what Madam Justice McLachlin said in *Avenue Properties*".

While the various versions of the test for determining whether a court should grant a stay of proceedings utilize somewhat different language, I do not believe that there is a fundamental difference between them.

The court must consider which forum has the most substantial connection to the parties and the transaction. In

answering that question it must review all of the factors which connect the parties and the transaction to each jurisdiction. It must consider, among other factors, the costs which each would impose on the parties, the presence of juridical advantage to one party (or disadvantage to the other) and the law governing the transaction. Lord Goff said in *Spiliada* (at p. 478):

> So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction, and the places where the parties respectively reside or carry on business. If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay . . . If however the court concludes at that stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.

I am in agreement with the observations of Mr. Justice Hinkson in *First City Investments, Inc.* that this is consistent with what was said in *Avenue Properties* by Madam Justice McLachlin.

Lord Goff pointed out in *Spiliada* that the requirements which had been set out by Lord Diplock in *MacShannon* (which ultimately evolved into the test known as the "modified English rule") were not intended to constitute an "immutable statement of the law". Lord Goff said (at p. 475):

> . . . I do not think that Lord Diplock himself would have regarded this passage as constituting an immutable statement of law, but rather as a tentative statement at an early stage of a period of

> development . . . Lord Diplock himself subsequently recognized that the mere existence of a "legitimate personal or juridical advantage" of the plaintiff in the English jurisdiction would not be decisive.

I think it clear that recent decisions of this Court demonstrate that the same view is taken in this jurisdiction.

Madam Justice McLachlin said in *Avenue Properties* that the courts should be careful that the desire to formulate a "test" or "rule" not divert them into an "overly legalistic approach" to this question, and that proper weight should be given to a plaintiff's right to bring action in the forum of his or her choice. Particularly where there is no related litigation already in progress in another jurisdiction with which the plaintiff's action could reasonably be joined, the plaintiff's *prima facie* right of choice of forum is not lightly to be interfered with: See *Canadian Commercial Bank v. Carpenter* (above).

Subject to that proviso, the process of deciding whether or not to grant a stay of proceedings is concerned with determining where it seems that justice will best be done.

I conclude that it is open to this Court to adopt the principles enunciated by Lord Goff in the *SNI* case and I approach this appeal guided by those principles. That is what the Chief Justice did in the court below, and with respect I think he was correct. The test set out by Lord Goff in the *SNI* case is found at p. 522 (3 All E.R.) and is as follows:

> In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that as a general rule, the English or Brunei court must con-

> clude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff is he is not allowed to do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction on appropriate terms, just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, prima facie, inappropriate can likewise often be solved by granting a stay on terms.

I turn now to the issue of natural forum and the significance, if any, to be accorded the fact that the Texas courts do not recognize a doctrine of *forum non conveniens* by reason of the interpretation the Supreme Court of Texas has put on section 71.031 of the Texas *Civil Practice and Remedies Code* in the case of *Dow Chemical Co. and Shell Oil Co. v. Domingo Castro Alfaro et al.*, No. C-7743. In that case the Supreme Court of Texas held that the legislature had statutorily abolished the doctrine of *forum non conveniens* in suits brought under section 71.031 of the *Code*. One of the majority judges concluded his reasons by saying:

> As a matter of law and of public policy, the doctrine of *forum non conveniens* should be abolished.

I quote from a dissenting opinion in the *Alfaro* case the definition of *forum non conveniens* as seen by that judge in the Texas Supreme Court:

> The United States Supreme Court, the District of Columbia, and forty States have all recognized what has come to be called the rule of *forum non conveniens*.

> Simply stated, the rule is that "[a] state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff". Restatement (Second) of Conflict of Laws 84 (1971). The rule is founded in "considerations of fundamental fairness and sensible and effective judicial administration."

On the issue of the weight, if any, to be accorded the fact that the courts in Texas do not recognize the doctrine of *forum non conveniens* I confess to not being entirely certain what the views of the Chief Justice ultimately were on this. At one point in his judgment the Chief Justice said that:

> . . . The refusal of Texas to accept *forum non conveniens* is a ground which can in my view be weighed in the balance in favour of those defendants in determining whether there has been oppression.

Later on in his judgment he said:

> The forum in which the claimants seek to pursue their claims is one which does not recognize the basic considerations of comity inherent in the doctrine of forum non conveniens. So, in deciding whether there has been oppression, no weight can be given to the decision of the court in that forum refusing a stay because it is not open to that court to consider such matters.

My own view is that the absence of the doctrine of *forum non conveniens* in the Texas courts, be it as a result of legislative enactment or not, plays a significant role in the case before us. I wish to make it clear that I do not regard the absence of a doctrine of *forum non conveniens* in Texas as decisive in this or any case. But here we have what in my view is a somewhat tenuous claim to jurisdiction in the first place along with the natural forum for the action clearly being in British Columbia in my opinion. I do not see this as a case where British Columbia is the more appropriate forum of one of two natural forums. I think that British Columbia is the one and only natural forum for this action. I note here

that in the *Castanho* case Lord Scarman said at p. 576 (A.C.) that in that case Texas was as natural and proper a forum as England. In his reasons for judgment in the court below in the case before us the Chief Justice concluded that British Columbia was a more natural forum. In my opinion it is the only natural forum on the facts before us. In *First City Investments Inc. et al. v. Shrum, Liddle and Hebenton et al.* (1988), 26 B.C.L.R. (2d) 46, Hinkson, J.A. in this court adopted as the test for what is the natural forum that with which the action has the most real and substantial connection. That test came from the judgment of Lord Goff In *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460. I do not mean to be taken as saying that in all cases there can be only one natural forum.

In my opinion the case before us is, on the facts, similar to *SNI* where Lord Goff concluded there was "nothing to connect the action with Texas at all." (All E.R. p. 523). In *SNI* Texas jurisdiction was asserted on the basis that *SNI* was doing business in Texas by selling its products to purchasers in Texas. In the *SNI* case a helicopter which crashed in Brunei killing a passenger who was a Brunei resident and whose estate was the plaintiff, had been manufactured in France by the defendants. The helicopter was owned by an English company but operated and serviced by a Malaysian company which was connected with the English company such that it was said to be "ultimately owned by the English company". The French company which manufactured the helicopter had a subsidiary in Texas to whom it sold helicopters. The plaintiffs commenced actions in both Brunei and Texas. The plaintiffs asserted that Texas was a more favourable jurisdiction to them because of its products liability law and the higher level of damages awarded than that given in Brunei courts. The defendants successfully sought an injunction in the Brunei courts restraining the plaintiffs from pursuing their action in Texas.

In this case the plaintiffs submitted to the Chief Justice that British Columbia is the natural forum for trying the issues that are raised in the Texas action. The acts and omissions which are the subject of the claims all occurred in Can-

ada, the claimants are British Columbia residents, or were at the material times, and it was in British Columbia that they suffered the injury and were admitted to compensation. The plaintiffs go on to submit that they have virtually no natural connection with Texas. They say that none of them is a Texas corporation, and with one or two exceptions, they are not shown to have had any connection with that State other than the sale of certain of their products.

I repeat in part the test set out by Lord Goff in the *SNI* case which is found at page 522 (3 All E.R.):

> In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff is he is not allowed to do so.

It is clear that the resolution of where the natural forum is does not necessarily conclude the matter. As pointed out by Lord Goff in *SNI* where there is a difference of opinion between the English court and the foreign court as to which is the natural forum, the English court could arrogate jurisdiction to itself by the grant of an injunction. This, however, would be inconsistent with comity and would disregard the fundamental requirement that an injunction will only be granted where required by the ends of justice (p. 521 and 522, 3 All E.R.).

The above observation of Lord Goff leads me to the issue of whether the injunction should be granted to prevent injustice, that is, whether the Texas proceedings can be said in the

circumstances to be vexatious or oppressive. In my opinion in this case the onus is on the plaintiffs before us.

In *SNI* reference was made to there being no doctrine of *forum conveniens* available to a defendant in the Texas courts where the claim was made under the Texas Wrongful Death Statute. I quote from the judgment of Chief Justice Esson on this point (p. 102, B.C.L.R.):

> That brings me to one of Mr. Camp's principal points of attack on the decision in *SNI*. He says that the Privy Council paid insufficient regard to the decision of the Texas court on *forum non conveniens* because, by the ordinary rules of comity, it should have been prepared to defer to the decision of the Texas court on the question whether proceeding in that jurisdiction would be oppressive of the defendant. In that case, Lord Goff dealt with the matter in this way at p. 155:
>
> > On 14 March 1986 the plaintiffs filed a motion to retain; and on 28 May 1986 the defendants filed a motion to dismiss on the ground of forum non conveniens. The court decided not to dismiss the action for want of prosecution, but fixed a trial date for 10 November 1986. Briefs were filed on the motion to dismiss on the ground of forum non conveniens. This motion was opposed by the plaintiffs on two grounds: (1) that, where, a claim is made under the Texas Wrongful Death Statute, as a matter of construction the doctrine of forum non conveniens has no application; and (2) that, in the alternative, the court should in any event exercise its discretion to refuse the defendants' motion on the ground of forum non conveniens. On 14 August 1986 the Texas court refused the defendants motion. In accordance with the practice of that court, no reasons were given for the decision; it is impossible therefore to know whether the decision was made on the first or the second ground advanced by the plaintiffs, nor, if the decision was made on the second ground, for what reasons it was held that the

> Texas court should not give effect to the doctrine of forum non conveniens. Furthermore, under the procedure of the Texas court, no appeal lay from this decision. An attempt was made to have the decision reviewed by petitioning the Court of Appeals for a writ of mandamus; but this failed, the petition being dismissed on 2 October 1986. A further petition to the Texas Supreme Court was dismissed on 5 November 1986; and a petition for a rehearing was dismissed on 3 December 1986. By then, the defendants had exhausted their remedies in Texas.

> There the matter was left by the Privy Council—simply as a part of the recital of the chronology. I think it likely that, had the Law Lords been able to conclude that the Texas court had considered the issue of *forum non conveniens* on the merits, they would have paid substantial deference to the decision of that court. In this case, for the reasons which I stated earlier, I conclude as a matter of fact that the applications of the asbestos companies were dismissed on what Lord Goff called the first ground, i.e., that as a matter of construction the doctrine of *forum non conveniens* has no application in that state. Once that conclusion is reached, I see no basis for deferring to a decision which establishes only that the jurisdiction in which the claimants wish to proceed is one which, as a matter of its domestic law, does not adhere to the broad considerations of comity which lie at the root of *forum non conveniens*. It does not necessarily follow that the Texas defendants are being oppressed by being sued in that jurisdiction, but the refusal of Texas to accept *forum non conveniens* is a ground which can in my view be weighed in the balance in favour of those defendants in determining whether there has been oppression.

It is now clear that the doctrine of *forum non conveniens* has no application in the Texas courts.

Speaking for myself I would have granted the injunction in the absence of the November 20th order of the Texas court referred to by the Chief Justice at B.C.L.R. pp. 103-104. That order was ex parte and it enjoined the plaintiffs in this action from seeking an injunction against the plaintiffs in Texas who live outside British Columbia. That order was obtained in Texas in circumstances which led the Chief Justice to refer to it as an "audacious step".

Considering what I have described before as the somewhat tenuous jurisdiction of the Texas courts on the facts before us and my conclusion that British Columbia is the only natural forum for this action, I think the denial to the defendants in Texas (the respondents in this court) of even a hearing on the merits of a plea of *forum non conveniens*, albeit as a result of a legislative enactment as construed by the Texas court, is enough to tip the scales leading to a finding of oppression. I reach this conclusion mindful of the fact that there are juridical advantages available in Texas to the defendants in this action on the issues of both liability and damages. On the issue of liability, and perhaps to some extent damages, the issue of choice of law is raised. If the fact pattern was reversed and the claimants sued in British Columbia, I would think the law of Texas would be applied on the issue of liability. What the position in Texas will be was not made clear to us in argument, but I understood counsel for the appellants to say that Texas law would be applied.

I think it useful on the issue of Texas not recognizing the doctrine of *forum non conveniens* to repeat the words of Lord Goff in *SNI* at p. 520-21 (3 All E.R.):

> In particular, the possibility must be borne in mind that foreign proceedings may be restrained not only where they are vexatious, in the sense of being frivolous or useless, but also where they are oppressive; and also that, as Bowen LJ observed, everything depends on the circumstances of the particular case, and new circumstances have emerged which were not, perhaps, foreseen by our Victorian predecessors. *Their Lordships refer, in particular, to the fact that litigants may now be encour-*

> *aged to proceed in foreign jurisdictions, having no connection with the subject matter of the dispute, which exercise an exceptionally broad jurisdiction and which offer such great inducements, in particular greatly enhanced, even punitive, damages, that they may tempt litigants to pursue their remedies there. In normal circumstances, application of the now very widely recognized principle of forum non conveniens should ensure that the foreign court will itself, where appropriate, decline to exercise its own jurisdiction*, especially as the existence of any particular advantage to the plaintiff in that jurisdiction (e.g. availability of assets for execution within the jurisdiction) can usually be protected, if thought appropriate, by granting a stay on terms. *But a stay may not be granted; and, if the English court concludes that it is the natural forum for the adjudication of the relevant dispute, and that by proceeding in the foreign court the plaintiff is acting oppressively, the English court may, in the interests of justice, grant an injunction restraining the plaintiff from pursuing the proceedings in the foreign court.*
> (emphasis mine)

Lord Goff contemplates a jurisdiction exercising "an exceptionally broad jurisdiction" which in normal circumstances would decline to exercise that jurisdiction on the basis of *forum non conveniens* where there is no connection with the dispute and the foreign jurisdiction. He goes on to contemplate the English court granting an injunction restraining such proceedings even where the foreign jurisdiction does not grant a stay. I think the oppression referred to by Lord Goff in the above quoted passage is to be found on the facts before us in the respondents being faced with these law suits in Texas and having no recourse to a plea of *forum non conveniens*. I wish again to emphasize that I view the fact of the doctrine of *forum non conveniens* not being applicable in Texas as but one of the considerations to be placed in the balance, and it becomes significant here only when placed against all the facts before us.

On the issue of comity raised by the defendants, I think there is little merit in this. I say this because the injunction sought here is in *personam* and operates only with respect to residents in British Columbia. It is not without significance that it is the Workers' Compensation Board in British Columbia that is *dominus litis* with respect to those claims. This injunction does not preclude the Texas courts taking jurisdiction in this matter, nor does it challenge that jurisdiction. The Texas courts still have jurisdiction. What has happened is that the claimants resident in British Columbia have been directed by the courts here to not invoke that jurisdiction in Texas. I do not think comity goes so far as to oblige the courts in British Columbia to stand idly by in circumstances where, if an action had been commenced here in similar circumstances to the action commenced in Texas, a stay would be granted; but the law of the foreign jurisdiction does not recognize the plea of *forum non conveniens*. It must be kept in mind that in granting this injunction the court here is simply exercising jurisdiction over residents within its jurisdiction. The injunction is not directed to the foreign court but only to the party within the jurisdiction of the court granting the injunction.

It may be that comity would play a more significant role if on the facts a plea of *forum non conveniens* was available in Texas to the plaintiffs before us and it was apparent from the judgment of the Texas court that the plea was not illusory and was heard on the merits, but did not succeed. That will have to be left to another day. If the defendants' submission before us that comity requires the court here to recognize the laws and jurisdiction of a foreign court is correct, then for all practical purposes in a case such as this there would be no functional doctrine of *forum non conveniens* as it relates to anti-suit injunctions in the law of British Columbia.

The defendants point out that no action has been commenced by them in British Columbia whereas in the cases referred to in argument there were actions commenced in both jurisdictions. I do not think this is of any significance. If this fact was definitive then a claimant could always defeat an anti-suit injunction by simply not commencing an action

in the jurisdiction where the anti-suit injunction is sought. That cannot be right.

The defendants assert there is no cause of action for an injunction alone and they successfully applied to have the plaintiffs' claims for damages for abuse of process struck out. On this issue the Chief Justice said:

> The question whether an interlocutory injunction can be granted except where it is ancillary to other relief being sought in the action is one which has been much considered by the English courts in recent years, and specifically in relation to injunctions of this general kind. Virtually all of the cases to which I have been referred in which anti-suit injunctions have been granted have been ones in which the application was brought in already existing litigation. But in many cases, of which *Castanho* and *SNI* are examples, the application was brought by defendants in the action who could not be said to be seeking an injunction as ancillary to other relief being sought by them. I think that the better view is that this form of injunction constitutes an exception to the basic principle restricting the grant of injunctions to certain exclusive categories. That view was adopted by the House of Lords in what appears to be the most authoritative case on the point: *South Carolina Co. v. Assurantie N.V.* [1987] 1 A.C. 24, per Lord Brandon at p. 40. It is interesting to note that Lord Brandon, speaking for the majority on this view, took a narrower view than that taken by Lord Mackay and Lord Goff, who expressed doubt that the power of the court to grant injunctions is no longer restricted to exclusive categories.
>
> As our underlying law governing the grant of injunctions is essentially the same as that of England, I see no reason not to accept the view of the law stated by Lord Brandon. That is enough to dispose of the objection.

I agree with what Chief Justice Esson said on this issue.

During the course of the hearing before us both sides sought leave to introduce new evidence. The evidence sought

to be introduced by both sides does not meet the test for its admissibility in this Court. That evidence was available to the parties before the hearing in the court below. This is an appeal from a discretionary order and in my view this Court should decide the matter on the basis of the evidence that was before the Chief Justice in the court below.

I would decline to admit this evidence.

It is apparent from what I have said that there is a fair question to be tried here. I do not think there is any ground for this Court to interfere with the discretion exercised by Chief Justice Esson in making the order he did.

In circumstances where all relevant facts are before this court, this Court may decide the issues before it and not order a trial of the issues. However, the matter is of some importance to all the parties and it is clear from the motions to adduce new evidence that all the facts necessary to decide this issue may not be before the Court. I think this case should go to trial where findings of fact can be made upon which the court's discretion may be exercised. I must emphasize that these reasons are based only on the facts before us. It may well be that at trial there will be additional facts that could lead to a result different than that reached by the Chief Justice and by this Court.

The plaintiffs cross-appealed from that part of the judgment which struck out the plea of damages for abuse of process. Only Flintkote pursued the cross appeal. The Chief Justice dealt with this claim briefly and succinctly when he said:

> At this point, I must consider the submission of the claimants that no interlocutory injunction can be granted because the asbestos companies have advanced no "viable" claim for other relief in this action. They say with some force that the assertion of abuse of process is, on its face, without substance. That is a tort of very limited application, an essential element of which is that the process must have been invoked for an improper purpose collateral to the ostensible purpose of the proceeding. See *Crowston v. Cove Developments*

> *Ltd.* (1978), 10 C.P.C. 88 (B.C.S.C.), (aff'd Feb. 8, 1980, CA790107). No allegation of that kind is made here. There is the additional difficulty in this case that the process complained about was issued in another jurisdiction. I conclude that this cause of action is brought forward only to attempt to satisfy the rule that an interlocutory injunction can be granted only as ancillary relief. I grant Mr. Camp's application to strike out that plea and the claim for damages.

I agree with the conclusion of the Chief Justice and with his reasons.

There is one further matter I should refer to. After judgment in this appeal was reserved written submissions were made by the defendants. I refer to the submissions "regarding settlement of the Order and the proposed terms to the anti-suit injunction". In view of the position taken by the plaintiffs on this and having regard for the memorandum of Chief Justice Esson dated April 13, 1990 I have not considered those submissions.

I would dismiss the appeals and cross-appeals.

The plaintiffs are entitled to their costs of the appeal and the defendants to the costs of the cross-appeal.

/s/ H. HOLLINRAKE

The Honourable Mr. Justice Hollinrake

I AGREE:

/s/ ALLAN MCEACHERN

The Honourable Chief Justice McEachern

/s/ F. TAGGART

The Honourable Mr. Justice Taggart

COURT OF APPEAL

Nos. CA011728
CA011731
CA011732
Vancouver Registry

BETWEEN: CA011728

T&N plc,

PLAINTIFF
(RESPONDENT)

AND:

WORKERS COMPENSATION BOARD

DEFENDANT
(APPELLANT)

AND:

CASSIAR MINING CORPORATION and others

DEFENDANTS

BETWEEN: CA011731

AMCHEM PRODUCTS INCORPORATED, and others

PLAINTIFFS
(RESPONDENTS)

AND:

CASSIAR MINING CORPORATION and others

DEFENDANTS

BETWEEN: CA011732

THE FLINTKOTE COMPANY

PLAINTIFF
(RESPONDENT)
(APPELLANT BY CROSS APPEAL)

AND:

WORKERS' COMPENSATION BOARD

DEFENDANT
(APPELLANT)
(RESPONDENT BY CROSS APPEAL)

AND:

PAUL AMBROSE and others

DEFENDANTS

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**REASONS FOR JUDGMENT**

**OF**

**THE HONOURABLE THE CHIEF JUSTICE**

---

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Taggart
The Honourable Mr. Justice Hollinrake

Counsel for the Appellants: J.J. Camp, Q.C., P.G. Foy and D.P. Church

Counsel for the Respondent Amchem Products Incorporated: B. Williams, Q.C. and T. Kowalchuk

Counsel for the Respondent T&N plc: J. Macaulay, Q.C. and K. Affleck

Counsel for Respondent The Flintkote Company: R. G. Ward and S. E. Fraser

Place and Date Heard: Vancouver, B.C. March 20, 21, 22, 23, 1990

Place and Date of Judgment: Vancouver, B.C.
November 5, 1990

*Concurrence*

I agree with Hollinrake J.A. whose judgment I have had the privilege of reading, that the absence from the law of the State of Texas of the disciplining principle of forum non conveniens, along with the other circumstances of this case, afford sufficient grounds upon which to dismiss these appeals. I accordingly agree that these appeals must be dismissed.

I also wish, however, to suggest another ground upon which these appeals could be decided, although it is unnecessary to rely upon it in this case. I mention this matter only because I believe there are serious deficiencies and uncertainties in the law which deserve consideration.

*Other considerations*

Canada, and many other countries are in the process of forming or joining major trading blocks of nations in a world of greatly increased international trade. It is inevitable that contests regarding the situs of much important litigation will more frequently arise in the future than in the past.

Plaintiffs, particularly in mass tort actions arising out of product manufacture and distribution, will naturally select the forum which offers the most advantages. This raises difficulties which transcend the issues in this case which, ultimately, the international legal community, and perhaps governments, may have to consider.

Defendants, of course will continue to seek protection from suits in inappropriate forums. The wealth of a community should not be exposed, unduly, to the risk of unfair international litigation. In this case British Columbia's wealth is not exposed, but the wealth of other jurisdictions is under attack by residents of this province in an inappropriate forum. What is happening to the defendants in this case could happen to the residents of any country, including our own.

While I have great respect for the careful judgments and opinions which have been delivered here and in other jurisdictions on these questions, it appears to me that they have been fashioned with a view to the facts of the individual cases which come before them based upon principles established before the development of widespread international trade in consumer goods, and before mass tort actions became common. In such an important matter the true course should be determined on modern principles rather than by devising creative and sometimes artificial undertakings which are often extracted from parties in order to avoid suit in an inappropriate forum.

Thus, the result of the leading case of *SNI Aerospatiale v. Lee Kui Jak and Another*, [1987] 3 All ER. 510 (J.C.P.C.) became a contest of undertakings with the plaintiffs agreeing that a trial in Texas would be decided pursuant to the law of Brunei (liability and damages), while the defendant's offered to allow evidence obtained by the plaintiffs' Texas attorneys to be available in any trial in Brunei, and to co-operate in enabling the Texas attorneys to appear at a trial in Brunei, etc.

In this case also, there are undertakings as required by Chief Justice Esson, and I do not suggest that undertakings should not continue to be used when they are necessary to obtain substantial fairness. I would prefer, however, for the law to provide a means to determine the appropriate forum without regard to undertakings, if possible, and then to add such conditions as may be necessary in the interest of justice.

Another aspect of the same problem, which I regard as a potentially serious deficiency in the law is its dependence upon the little understood concept of comity upon which so much depends, and which is often more a matter of legal fiction than of reality or principle.

Thus, in this case it was suggested that the principle of comity prevented the courts of this province from questioning the bona fides of litigation in Texas. Mr. Camp says we must assume, without inquiry, that Texas practice, although different from our own, is entirely appropriate, or at least not

open to question or challenge in this court. I shall return to this question shortly.

*The Present Law*

SNI is the latest and most authoritative pronouncement on the law relating to anti-suit injunctions. The fact that it reaches a different conclusion from the earlier decision in the House of Lords in *Castanho v. Brown & Root (U.K. Ltd. and Another*, (1980) A.C. 557 indicates the difficulties which exist in the present law. I wish to state what I understand is the result of the SNI decision:

(1) ". . . the jurisdiction [to grant an anti-suit injunction] is to be exercised when the 'ends of justice' require it . . ." (p. 519 b-c);

(2) ". . . where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed . . ." (p. 519 c-d);

(c) ". . . an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court against whom an injunction will be an effective remedy . . ." (p. 519 e-f);

(d) ". . . the jurisdiction is one which must be exercised with caution, . . ." (p. 519 (f-g);

(e) the principle forum non conveniens will generally ". . . ensure that [the] foreign court will itself, where appropriate, decline to exercise its own jurisdiction . . ." (p. 521 b);

(f) where a remedy for a particular alleged wrong is available in two jurisdictions, and the problem is not solved by the proper application of the forum non conveniens rule, it will not be proper to grant an anti-suit injunction merely upon the ground that the court entertaining the application for an injunction concludes that

it is the natural forum, ie. the court which is most closely connected with the subject matter of the litigation, p. 522 a-b and f-i);

(g) thus, where remedies are available in more than one jurisdiction, the principles of comity requires the court hearing the application to decline to act unless required to do so in the interests of justice, and in that respect, ". . . account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the forging proceedings, but also of injustice to the plaintiff if he is not allowed to do so." (p. 522 g-i):

(h) ". . . as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him." (p. 522 g-i);

(i) the fact that a foreign court provides advantages to plaintiffs such as strict liability or punitive damages which will not be available in the natural forum cannot always be considered vexatious or oppressive, as they might otherwise be, if such advantages are neutralized by undertakings (p. 524 h-j);

(j) defendant's difficulties impleading third or other parties, or enforcing judgments against such parties in a forum other than the natural forum may in some cases ". . . properly be described as oppressive." (p. 526 j)

While this is an admirable attempt to structure a formula for the management of a difficult and complicated problem, it is largely ad hoc, and lacks the precision reasonably expected of a systematic approach which is so desirable in such matters.

*Applying SNI to this case.*

In this analysis I snall refer to the plaintiff's in Texas (defendants here) as plaintiffs, and to the asbestos producers

or contractors (defendants in Texas and plaintiffs here), as defendants.

It seems clear that all the British Columbia plaintiffs, except possibly one, suffered their exposure to asbestos, if at all, in this province and they have all claimed and received worker compensation benefits here, making British Columbia the obvious natural forum for their claims.

Texas offers jurisdiction for these claims against all of the defendants (except Cassiar) based upon the presence in one form or another of some of the defendants in Texas and of the others in the United States and the sale of some of the defendants goods in Texas.

Texas offers substantial juridical advantages to the claimants through principles of unlimited jury trials, strict liability, punitive damages, and evidentiary convenience which permits testimony taken in a multitude of other asbestos litigation to be adduced in subsequent litigation. The plaintiffs also offer a choice of counsel argument as another advantage—a gentleman who specializes in asbestos litigation in rural Harrison County, Texas, where asbestos litigation has, apparently, become a local growth industry.

Advantages in British Columbia to the defendants, I suppose, include the reverse side of the plaintiffs' advantages just mentioned, plus the presence here of all their medical and employment records, and evidence relating to their exposure to asbestos. In addition, the defendants may have difficulties with their 3rd party claim to contribution from Cassiar (which was not sued in Texas, and may not have a presence in the United States although that is not clear).

Considering the total absence of any connection between any of these plaintiffs but one with Texas, and the tenuous connection of many of the defendants with that state, although some of them have been sued there many times under similar circumstances to those to which they object in this case, it is my view that the proper application of the forum non conveniens principle by the courts of Texas would probably and properly lead the courts of Texas to decline jurisdiction in these cases. But as explained in the judgment

of Hollinrake J.A., that option is not open to them under the law of Texas.

Apart from that, I would conclude, after balancing advantages and disadvantages on both sides, that it is oppressive for these defendants to be impleaded in a case brought by these plaintiffs in Texas for wrongs allegedly done to them here over the past 40 years or so. Texas is clearly inconveniently distant from the sources of the essential evidence required for the proper investigation of such claims. This is particularly so when the defendants also face a process so fraught with unusual legal difficulty such as choice of law, admissibility of evidence obtained in previous proceedings, Workers' Compensation legislation, contribution from absent 3rd parties, etc., all in a jurisdiction other than the natural forum.

Applying the tests set out in SNI, therefore, I have no doubt the conduct of these proceedings in Texas amounts to the kind of oppression which authorized the learned Chambers Judge to conclude, as he did, that he should grant an anti-suit injunction.

I turn to the other serious difficulty I mentioned which is avoided by the judgment under appeal but which requires the attention of the international legal community. That is simply whether the principle of comity, as briefly outlined above, is a sufficient safeguard to possible international unfairness.

I ask this question because it is naive, in my view, to assume that the courts of every jurisdiction will properly or uniformly discipline themselves by deferring to the natural forum even if they purport to apply the forum non conveniens principle.

In my respectful view it would be better if the governing rule were simply that issues should be tried and decided only in the natural forum, that is the one with the closest connection to the litigation, and that each jurisdiction should enforce that rule against its own citizens by injunction or other process as may be appropriate.

The determination of "natural forum" requires careful consideration, but I would think the place where the tort operates in the circumstances of the case, the usual or sub-

stantial residence of the parties, and convenience in relation to the situs of the evidence required by each party would be the primary considerations.

Where there is more than one natural forum, which will be rare, then, subject to whatever safeguards the justice of the case may require, I would seek to apply the principles described in SNI, adapted to the particular circumstances of the case.

Here, as there is only one natural forum, I would, if necessary, also support the judgement of Chief Justice Esson on that ground as well as the absence of the forum non conveniens rule in Texas. It is the responsibility, in my view, of the courts of each jurisdiction to ensure, if the question arises, that its citizens do not bring proceedings other than in the natural forum. If every jurisdiction did this then the international legal community could plan its affairs without risk of suits being brought in courts of convenience to only one party.

As the order under appeal is an interim injunction and there may be a trial, this question may or may not be raised and I would not venture any final opinion without hearing evidence and argument. I can only say that I am not persuaded blind and absolute obedience to the principle of comity to the extent mentioned above is an invariable rule courts must apply when considering whether persons amenable to the jurisdiction of this court may pursue a defendant other than in the natural forum. I would dismiss these appeals.

/s/ ALLAN MCEACHERN

The Honourable Chief Justice
Allan McEachern

No. C895759
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

| | | |
|---|---|---|
| Between: | ) | |
| | ) | |
| Amchem Products Incorporated and Others | ) | |
| | ) | |
| Plaintiffs | ) | Reasons for |
| And: | ) | Judgment of |
| | ) | the Honourable |
| Workers' Compensation Board and Others | ) | The Chief Justice |
| | ) | |
| | ) | |
| Defendants | ) | |

| | |
|---|---|
| Date and Place of Hearing: | November 21, 22 & 23, 1989 Vancouver, B.C. |
| Counsel for the Plaintiffs Anchem Products Incorporated: | Bryan Williams, Q.C., and Terry Kowalchuk |
| Counsel for All Defendants Other Than Cassiar Mining Corporation: | J.J. Camp, Q.C. and D.P. Church |
| Counsel for the Defendant Cassiar Mining Corporation: | W.O'M. Forbes |
| Dated: | December 6, 1989 |

The plaintiffs apply to enjoin the defendants (other than Cassiar) from proceeding with litigation pending in the State of Texas, in which the defendants here are plaintiffs and the plaintiffs here are defendants.

The style of cause on these reasons is the abbreviated form which has been used, and should continue to be used, on all documents after the initiating ones. But I note here that the number of "others" is very large. The total number of plaintiffs is 26 and of defendants 196, of whom 194 are individuals.

The plaintiffs have in common that they are bodies corporate which either engage, or have engaged, in the manufacture and supply of asbestos products used in the construction of ships and buildings. Twenty-five of the plaintiffs were incorporated and have their principal places of business in the United States. One (Carey Canada Inc.) is a Quebec company with its principal place of business there. None of the American companies was incorporated in Texas but one has a principal office in Texas and one has a subsidiary with a principal place of business in Texas. None of the plaintiffs have, as I understand it, any connection with this province.

The 194 individual claimants are the plaintiffs in the Texas action. They were joined in this action on the basis of the plaintiffs' belief that all are, or were at material times, British Columbia residents who suffered injury in this province and who elected for compensation so that the W.C.B. is subrogated to their claims. The W.C.B. admits that most of the claimants are in that position but has produced evidence to establish that 40 of the individual claimants reside outside British Columbia and have no connection with it, and that one of the claimants resident in B.C. did not elect compensation. At this point, the precise numbers do not matter. The injunction is sought against those claimants, and in respect of those claims, which arose in this province. I note here that the total number of claimants sub-stantially exceeds the number of claims, defining a claim for this purpose as one which arises from an injury alleged to have been suffered by an individual as a result of exposure to asbestos. Many of the persons alleged to have suffered such injury are now dead.

Those claims are advanced by their dependents of whom, in many instances, there are two or more in respect of a individual claim.

The W.C.B. is not a party to the Texas action but is *dominus litus* in respect of all claims to which it is subrogated. See s.10 of the *Workers Compensation Act* and the decision of this court in *Evans v. Vancouver Port Corporation* (1988) 30 B.C.L.R. (2d) 265 Gibbs J. (now J.A.). By that route, the W.C.B. is directly involved in the Texas action. It is conceded that the attorneys who have the conduct of that action are, in respect of the subrogated claims, acting on the instructions of the W.C.B.

The other corporate defendant is Cassiar Mining Corporation, a British Columbia corporation which has engaged in the mining of asbestos in this province. Unlike all other parties, it is not involved in any way with the Texas action. Although no injunction is sought against it, its position in relation to the claims is relevant to the injunction application so I will explain it here. The asbestos companies point to evidence indicating that some of the asbestos to which the claimants were exposed may have been supplied by Cassiar, and therefore assert that, if they are to be held liable for supplying asbestos which caused or contributed to the injuries, they should be able to seek contribution or indemnity from Cassiar. They say that Cassiar cannot be impleaded in the Texas action and that, in any event, it would be futile to do so because any judgment against it would be unenforceable by reason of the provisions of s.41.1 of the *Court Order Enforcement Act*, R.S.B.C. 1979, c.75:

Loss or injury caused by asbestos

4.1 (1) In this section

'asbestos' means naturally occurring, highly fibrous, heat insulating and chemically inert silicate minerals belonging to either serpentine or amphibole groups and includes chrysotile, crocidolite, amosite, anthopyllite, tremolite and actinolite and any other mineral commonly known as asbestos;

'judgment' means

(a) a judgment or order given in a proceeding outside Canada, or

(b) a judgment or order given in another province of Canada resulting from an action on or a registration of a judgment or order described in paragraph (a).

I note here that separate actions have been begun by an American company, The Flintkote Company, and an English company, T. & N. plc., in which those plaintiffs seek essentially the same relief as that sought in this action. Their applications for interlocutory injunctions were heard with this one. Because nearly all of the parties are plaintiffs in one jurisdiction and defendants in another, I will, except where it is necessary to distinguish more particularly, generally refer to the plaintiffs in this action along with Flintkote and T. & N. plc. as the "asbestos companies" and to the individual defendants as "the claimants".

The Texas action was launched in July, 1988 in the name of 9 individual claimants, all in respect of claims to which the W.C.B. is subrogated. Since that time, by a process of adding "intervenors", the number of plaintiffs has swollen to the present figure of about 194, including the forty or so claims to which the W.C.B. is said not to be subrogated. The defendants named in the Texas action are 33 in number, made up of the 26 plaintiffs in this action, the 2 corporations which have brought separate actions in British Columbia and 5 others who are said either to have been dismissed from the action, to have settled with the claimants, or to be bankrupt. In other words, claims are no longer being made against them. The claimants say that there is still a claim against Raymark Industries, Inc. and that it is a subsidiary of one of the 26 plaintiffs in this action. They attach particular importance to that because Raymark had or has a place of operations in Texas.

The complaint in the Texas action seeks damages arising from exposure of the claimants (or the "decedents" in

respect of whom they claim) to asbestos fibres or products containing asbestos which are alleged to have been manufactured and placed into the "stream of commerce" by the asbestos companies. That exposure is alleged to have caused injury to the "respiratory system and body in general" of the persons exposed to it and to have been a cause of the death of the decedents. It is alleged in the complaint that the individuals worked with and inhaled the dangerous fibres produced by the products as a result of the negligence of the asbestos companies and their failure to warn that exposure was dangerous. There are allegations of breach of warranty of fitness. It is alleged that the individuals who were injured were foreseeable users of the products which were being used in their intended manner at the time of injury. It is also alleged that the asbestos companies, "acting separately and in consort with various representatives of the (asbestos) industry", committed acts and omissions calculated to cover up or minimize the known dangers of asbestos and the products containing it; that such conduct amounted to fraud and that the acts and omissions were committed intentionally, wilfully and maliciously with reckless disregard for the rights of others and that, as a result, punitive damages should be awarded. It is alleged that all of the defendants in the Texas action do business in that state and that their products have been placed in commerce and are sold and used within that state. It is further alleged that "all of the acts and omissions complained of herein occurred in Canada". Jurisdiction and venue is asserted to flow from s.71.031 of the *Texas Civil Remedies Code*.

The Statement of Claim in this action, which runs to about 20 pages, claims this relief against the W.C.B. and the individual claimants:

(a) A declaration that B.C. is the natural forum for the trial of the matters raised in the Texas action.

(b) A declaration that the asbestos companies are not liable to the claimants in respect of any of the matters raised in the Texas action.

(c) An injunction restraining the defendants in this action from taking any step in Texas to obtain an order enjoining the asbestos companies from seeking the relief claimed in this action.

(d) An injunction restraining the present defendants from further prosecuting the Texas action.

There is also a claim for damages which is based upon the assertion that the asbestos companies have been put to excessive and unnecessary costs and expense in defending the Texas action. The ground for claiming damages, as I understand it, is that the bringing and maintaining of the Texas action is an "abuse of process". As the only process issued by the claimants was that in Texas, this is presumably a claim that the Texas action is an abuse of process which can be the subject of damages in this jurisdiction.

*TEXAS ACTION*

The Texas action, begun in 1988, has been pressed forward to the point that a jury trial is scheduled to begin on December 18, 1989. That trial will deal with the claims of 5 of the individual claimants, all persons to whose claims the W.C.B. is subrogated, including 2 of the original 9 plaintiffs.

The trial date was set in September, 1989 at the point where the asbestos companies exhausted their efforts to persuade the Texas courts to decline jurisdiction over the claims. In a number of proceedings, including an appeal to the Texas Court of Appeal, the asbestos companies sought a stay of the action on the ground of *forum non conveniens*. The primary ground upon which those applications were opposed appears, from the written briefs included in the evidence in this application, to have been that the law of Texas does not recognize that doctrine, and that any plaintiff who can bring a case within the rather liberal provisions of the Texas statute in respect of jurisdiction and venue is entitled as of right to have his action decided in Texas. For an action of this kind, the requirement to found jurisdiction and venue is apparently

met by establishing that the products of a manufacturer have been sold in Texas.

As is apparently customary in Texas, no reasons were given for dismissing the applications for a stay. One therefore cannot know to a certainty whether any decision was reached on the merits of the *forum non conveniens* argument. The tenor of the arguments put forward in Texas inclines me to think that it is likely that the court gave effect to the rule, which was supported by many case authorities, to the effect that it is not open to a Texas court to grant a stay on the ground of *forum non conveniens*. The claimants have put forward evidence of two lawyers, qualified as expert witnesses and one of whom is an independent witness, who flatly state that to be the law. There is pending before the Texas Supreme Court a case in which it is sought to overturn that rule but the claimants' evidence is that, even if that court changes the rule, the decision would not apply to this case. The asbestos companies, who do not wish to concede the absolute rule to be the law of Texas, have put forward some evidence pointing in the other direction but I find, on the evidence before me, that the law of Texas is as asserted by the claimants and that it was not open to the Texas court to consider in this case the merits of the *forum non conveniens* issue.

*THE LAW*

The "anti-suit injunction" has rarely been sought in Canada. Counsel referred me to no British Columbia decisions although, in very recent years, there have been a number in other provinces. Until very recently, virtually the only Canadian decision appears to have been that of McRuer C.J.H.C. in *The Chesapeake and Ohio Railway Company v. Ball*, [1953] O.R. 843, a case which has frequently been cited for that learned judge's observations on the general principles governing the grant of interlocutory injunctions. The principles governing the grant of an anti-suit injunction appear not to have been considered by any Canadian appellate court.

Such injunctions have, however, long been recognized in England and, within this decade, have been dealt with by the

House of Lords and Privy Council. The discussion of those principles has been linked closely to the principles applicable to related issues, *i.e.*, the granting of a stay of an action begun within England and the granting of orders for service *ex juris* upon intended defendants not resident in England. Some of the cases in which those principles have been considered at the highest level are:

> *The Atlantic Star*, [1974] A.C. 436; [1973] 2 All E.R. 175;
>
> *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795; [1978] 1 All E.R. 625;
>
> *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C.; 210; [1977] 3 All E.R. 803;
>
> *Castanho v. Brown & Root (U.K.) Ltd. and Another* [1981] A.C. 557, [1981] 1 All E.R. 143;
>
> *British Airways Board v. Laker Airways Ltd.* [1984] A.C. 58, 3 All E.R. 39, [1985];
>
> *The Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460; [1986] 3 All E.R. 843;
>
> *SNI Aerospatiale v. Lee Kui Jak* [1987] 3 All E.R. 510 (PC).

Of those cases, only *Castanho v. Brown* and *SNI Aerospatiale* deal directly with anti-suit injunctions. In the absence of any decisions binding on this court I will accept those two cases as being of the most highly persuasive authority. No authority was cited from elsewhere in the Commonwealth. The subject of *forum non conveniens* and the anti-suit injunction has been extensively dealt with in the United States in recent years but counsel did not refer to the U.S. authorities and I am unwilling, without assistance from counsel, to try to navigate through that sea of case authorities.

Because of the close link between the principles applicable to the anti-suit injunction and those applicable to granting a stay of an action within the jurisdiction, there are decisions

of our Court of Appeal which have some application to the issues here. The question of stay has been considered in a number of recent decisions including *Rogers v. Bank of Montreal* (1984) 49 B.C.L.R. 85; *Avenue Properties Ltd. v. First City Development Corporation Ltd. et al.* (1986) 7 B.C.L.R. (2d) 45; *First City Investments Inc. et al. v. Shrum, Liddle and Hebenton et al.* (1988) 26 B.C.L.R. (2d) 46; *Canadian Commercial Bank v. Charles C. Carpenter et al. and Bennett Jones et al.* (B.C.C.A. No. 10415 Van. Reg.—judgment pronounced October 5, 1989).

Both *Castanho v. Brown & Root* and *SNI Aerospatiale*, interestingly enough, involved applications to enjoin the plaintiffs from proceeding with actions begun in Texas after actions had been brought in England or, in the case of *SNI*, Brunei, which is subject to English law.

Mr. Castanho was a Portuguese citizen who suffered severe injuries on board a ship of which he was a crew member while it was lying in an English port. The first defendant in the English action was an English company which provided shore services to the ship, the second a Panamanian company which operated the ship. Both defendants were "associates" of a large group of companies which had its headquarters in Texas. Liability was apparently never seriously in issue. At an early stage of the English action, a consent order was made for substantial interim payments. Then a firm of Texan attorneys got in touch with the plaintiff and obtained from him a power of attorney giving them exclusive powers to prosecute his claim in the United States and providing for a contingency fee of 40 percent. The plaintiff then discontinued the English action. The defendants applied to set aside the notice of discontinuance and to enjoin him from proceeding in Texas. The chambers judge found for the defendants on both issues. The Court of Appeal, by a majority judgment, restored the notice of discontinuance and discharged the injunction. The House of Lords, in an unanimous decision, upheld the Court of Appeal's decision on the injunction although, for reasons that have no relevance here, it found that the discontinuance was an abuse of process.

Lord Scarman's analysis of the applicable law, concurred in by all of the Law Lords, was stated thus at p. 574-5 (All E.R.):

> I turn to consider what criteria should govern the exercise of the court's discretion to impose a stay or grant an injunction. It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings. The modern statement of the law is to be found in the majority speeches in *The Atlantic Star* [1974] A.C.436. It had been thought that the criteria for staying (or restraining) proceedings were two-fold: (*1*) that to allow the proceedings to continue would be oppressive or vexatious, and (*2*) that to stay (or restrain) them would not cause injustice to the plaintiff: see Scott L.J. in *St. Pierre v. South American Stores (Gath and Chaves) Ltd.* [1936] 1 K.B. 382, 398. In *The Atlantic Star* this House, while refusing to go as far as the Scottish doctrine of forum non conveniens, extended and re-formulated, the criteria, treating the epithets 'vexatious' and 'oppressive' as illustrating but not confining the jurisdiction. My noble and learned friend Lord Wilberforce put it in this way. The 'critical equation,' he said at p. 468, was between 'any advantage to the plaintiff' and 'any disadvantage to the defendant.' Though this is essentially a matter for the court's discretion, it is possible, he said, to 'make explicit' some elements. He then went on, at pp. 468-469:
>
> > 'The cases say that the advantage must not be 'fanciful'—that a 'substantial advantage' is enough . . . A bona fide advantage to a plaintiff is a solid weight in the scale, often a decisive weight, but not always so. Then the disadvantage to the defendant: to be taken into account at all this must be serious, more than mere disadvantage of multiple suits; . . . I think too that there must be a relative ele-

> ment in assessing both advantage and disadvantage—relative to the individual circumstances of the plaintiff and defendant.'
>
> (Emphasis supplied)

In *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, 812 my noble and learned friend, Lord Diplock, interpreted the majority speeches in *The Atlantic Star* [1974] A.C. 436, as an invitation to drop the use of the words 'vexatious' and 'oppressive' (an invitation which I gladly accept) and formulated his distillation of principle in words which are now very familiar:

> In order to justify a stay two conditions must be satisfied, one positive and the other negative: (*a*) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (*b*) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.'

Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendants must show: (*a*) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, and (*b*) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction.

> The formula is not, however, to be construed as a statute. No time should be spent in speculating as to what is meant by 'legitimate.' It, like the whole of the context, is but a guide to solving in the particular circumstances of the case the 'critical equation' between advantage to circumstances of the

> case the 'critical equation' between advantage to the plaintiff and disadvantage to the defendants.

Having reviewed the grounds upon which the chambers judge had granted an injunction, and those upon which the majority of the Court of Appeal had interfered with that exercise of his discretion, Lord Scarman went on to say at p. 576:

> It is, therefore, open to this House to review the exercise of the judge's discretion. My Lords, upon this aspect of the case I find the judgment of Brandon L.J. convincing. He found that to restrain the plaintiff from proceeding in Texas would deprive him of a legitimate personal or juridical advantage: I agree. If he had been advised early enough to sue the J.M.C. group in Texas first, they could not have compelled him to sue in England. The only additional expense incurred by the defendants as a result of the plaintiff suing first in England has been that of legal costs, which are recoverable by the defendants. Texas is as natural and proper a forum for suing a group of Texan-based companies as England—even though England, as the scene of the accident is also a natural and proper forum. . . . For the reasons which Brandon L.J. gives I agree with his conclusion 'that the balance comes down clearly in the plaintiff's favour'.

The *SNI* case arose out of a helicopter crash in Brunei in which a passenger, a resident of Brunei, was killed. The helicopter had been manufactured in France by the defendant, a French company which had a subsidiary in Texas to which it sold helicopters. The helicopter was owned by an English company but was at all material times operated and serviced by Bristow Malaysia, a Malaysian company of which the English company was said to be the ultimate owner. The widow and administrators of the passenger's estate launched actions in France, Brunei and Texas. The defendant applied to the Brunei court to enjoin the plaintiffs from proceeding in Texas. That court held that Texas had become the natural

forum by reason of pre-trial discovery carried out there and that it was the forum in which the case could be more suitably tried because of the early trial scheduled there and the fact that the Texas attorneys were familiar with the case. The defendants appealed to the Privy Council which reversed and granted the injunction.

The judgment of the Board, differently constituted from the court which sat on *Castanho v. Brown & Root*, was delivered by Lord Goff of Chieveley. It is a lengthy and elaborate analysis of the principles applicable to such applications. The applicants here rely particularly upon these passages which appear at pp. 519-521 (All E.R.):

> The law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history, stretching back at least as far as the early nineteenth century. From an early stage, certain basic principles emerged which are now beyond dispute. First, the jurisdiction is to be exercised when "the ends of justice" require it. . . . This fundamental principle has been reasserted in recent years. . . . Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. . . . .
>
> Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court against whom an injunction will be an effective remedy. . . . Fourth, it has been emphasized on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution. . . . All of this, their Lordships think, uncontroversial; but it has to be recognized that it does not provide very much guidance to judges at first instance who have to decide whether or not to exercise the jurisdiction in any particular case.
>
> The decided cases, stretching back over a hundred years and more, provide however a useful source of experience

from which guidance may be drawn. They show, moreover, judges seeking to apply the fundamental principles in certain categories of case, while at the same time never asserting that the jurisdiction is to be confined to those categories. . . . The old principle that an injunction may be granted to restrain the pursuit of foreign proceedings on the grounds of *vexation or oppression*, though it should not be regarded as the only ground on which the jurisdiction may be exercised, is of such importance and of such apparent relevance in the present case, that it is desirable to examine it in a little detail. As with the basic principle of justice underlying the whole of this jurisdiction, it has been emphasized that the notions of vexation and oppression should not be restricted by definition. As Bowen, L.J. said in *McHenry v. Lewis* . . .

> I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case.

. . . But their Lordships, bearing in mind the words of caution expressed by Bowen, L.J. in *McHenry v. Lewis* . . . quoted above, think it wise to remember the breadth of the jurisdiction. In particular, the possibility must be borne in mind that foreign proceedings may be restrained not only where they are vexatious, in the sense of being frivolous or useless, but also where they are oppressive; and also that, as Bowen, L.J. observed, everything depends on the circumstances of the particu-

lar case, and new circumstances have emerged which were not, perhaps, foreseen by our Victorian predecessors. *Their Lordships refer, in particular, to the fact that litigants may now be encouraged to proceed in foreign jurisdictions, having no connection with the subject matter of the dispute, which exercise an exceptionally broad jurisdiction and which offer such great inducements, in particular greatly enhanced, even punitive, damages, that they may tempt litigants to pursue their remedies there.* In normal circumstances, application of the now very widely recognized principle of forum non conveniens should ensure that the foreign court will itself, where appropriate, decline to exercise its own jurisdiction, especially as the existence of any particular advantage to the plaintiff in that jurisdiction (*eg* availability of assets for execution within the jurisdiction) can usually be protected, if thought appropriate, by granting a stay on terms. *But a stay may not be granted; and, if the English court concludes that it is the natural forum for the adjudication of the relevant dispute, and that by proceeding in the foreign court the plaintiff is acting oppressively, the English court may, in the interests of justice, grant an injunction restraining the plaintiff from pursuing the proceedings in the foreign court. As Bowen, L.J. said in Peruvian Guana Co. v. Bockwoldt . . ., the court will interfere when a party is acting under colour of asking for justice 'in a way which necessarily involves injustice' to others.*

(Emphasis added)

The applicants place particular emphasis upon the passages which I have underlined. They say that the circumstances of this case are essentially indistinguishable from those in *SNI* and that this court must conclude that British Columbia is the natural forum for adjudicating the dispute and that, by proceeding in Texas, the plaintiffs are acting oppressively, and under colour of asking for justice "in a way which necessarily involves injustice" to the asbestos companies.

The passages which I have quoted are important in that they set out the general principles accepted by the Privy Council. Other passages are important in relation to the question whether the result here should be the same. As to that, it is worthy of note that the Privy Council in 1987 rejected the rule, laid down by Lord Scarman in *Castanho v. Brown & Root* in 1981, that the applicable principles in relation to staying proceedings within the jurisdiction are the same as those applicable to enjoining proceeding in another jurisdiction. At p.521, Lord Goff, after referring to the decision of the House in *Spiliada* (*supra*) (a case in which British Columbia was the "other jurisdiction") went on to say:

> . . . If Lord Scarman's approach were to be adapted to take account of the statement of principle expressed in *The Spiliada* as applicable in cases of stay of proceedings, it would presumably read as follows. To justify the grant of an injunction the defendant must show (*a*) that the English court is the natural forum for the trial of the action to whose jurisdiction the parties are amendable and (*b*) that justice does not require that the action should nevertheless be allowed to proceed in the foreign court.
>
> In practice, however, the principle so stated would have the effect that, where the parties are in dispute on the point whether the action should proceed in an English or a foreign court, the English court would be prepared, not merely to decline to adjudicate by granting a stay of proceedings on the ground that the English court was forum non conveniens, but, if it concluded that England was the natural forum, to restrain a party from proceeding in the foreign court *on that ground alone*. Their Lordships cannot think that this is right. Not only does it conflict with the observation of Brett MR in *Hyman v. Helm* referred to above, but it leads to the conclusion that, in a case where there is simply a difference of view between the English court and the foreign court as to which is the natural forum, the English court can arrogate to itself, by the grant of an injunc-

tion, the power to resolve that dispute. . . . But, with all respect, such a conclusion appears to their Lordships to be inconsistent with comity, and, indeed, to disregard the fundamental requirement that an injunction will only be granted where the ends of justice so require. . . .

For all these reasons, their Lordships are of the opinion that the long line of English cases concerned with injunctions restraining foreign proceedings still provides useful guidance on the circumstances in which such injunctions may be granted, though of course the law on the subject is in a continuous state of development. They are further of the opinion that the fact that the Scottish principle of forum non conveniens has now been adopted in England and is applicable in cases of stay of proceedings provides no good reason for departing from those principles. They wish to observe that, in *The Spiliada* [1986] 3 All ER 843 esp at 857-858, [1987] AC 460 esp at 480 per Lord Goff, care was taken to state the principle of forum non conveniens without reference to cases on injunctions. They cannot help but think that the suggestion in *Castanho's* case that the principle is the same in cases of stay of proceedings and in cases of injunctions finds its origin in the fact that the argument of counsel before the House of Lords appears to have proceeded very substantially on that assumption. In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So, as a gen-

> eral rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him.
>
> (Emphasis added)

At pp. 522-523, Lord Goff said, after holding that the Brunei court had not proceeded on correct principles in considering whether to grant an injunction:

> . . . It is necessary therefore for their Lordships to consider de novo, on the applicable principles as stated by them, whether the decision to refuse an injunction should stand.
>
> Now, if a question (which their Lordships accept could only be hypothetical) had arisen shortly after the commencement of proceedings by the plaintiffs in Brunei whether those proceedings should be stayed on the ground that there existed another forum, i.e. Texas, which was clearly more appropriate for the trial of the action, there can be no doubt that such a question would have been answered unhesitatingly in the negative. Obviously, there were strong connecting factors with Brunei, as a forum. The fatal accident had happened there. In a sense that was fortuitous; but it carried with it the consequence that the applicable law governing the claim was the law of Brunei. Moreover, that was by no means insignificant in the circumstances because, as compared with the law of Texas, no question arises under the law of Brunei of strict product liability, no question arises under the law of Brunei of punitive damages and, perhaps most important of all, the problem does arise under the law of Brunei of an award of damages for the so-called 'lost years', . . . . In addition, the deceased was resident in Brunei and carried on his principal business there; and the plaintiffs, his widow and her co-administrator, are likewise resident in Brunei. Again, having regard to the very substantial income of the deceased, and the volatile nature of the oil industry on which his business depended, it is plain

that witnesses of fact, experienced in the conditions of that industry in Brunei, are likely to be called on the issue of quantum.

As against these factors, there was absolutely nothing to connect the action with Texas at all.

At pp. 524-525, Lord Goff said:

> . . . The mere fact that the courts of Brunei provide the natural forum for the action is, for reasons already given, not enough of itself to justify the grant of an injunction. An injunction will only be granted to prevent injustice, and, in the context of a case such as the present, that means that the Texas proceedings must be shown in the circumstances to be vexatious or oppressive.
>
> Now it can no longer be suggested that the Texas proceedings are vexatious or oppressive on the ground that the plaintiffs are seeking, in an inappropriate forum, to impose a strict liability or liability for punitive damages which would not be available in the natural forum. These points have been effectively neutralised by the plaintiffs' undertaking that neither of them will be pursued, and by their further undertaking that they will not invoke jury trial, which, coupled with the effect of the contingency fee system, might lead to a substantial enhancement of an award of damages. These points have therefore ceased to have such relevance as they might otherwise have had. There remains however a matter to which their Lordships attach great importance, and that is the question of a claim by SNIAS over against Bristow Malaysia.

In the final analysis, the sole ground upon which the Privy Council enjoined proceeding with the Texas action was the difficulty which the defendant manufacturer would have had in pursuing its third party claim against Bristow Malaysia, which had offered to attorn to the jurisdiction of the Brunei

court but stoutly resisted all attempts to implead it in Texas. At pp. 526-527, Lord Goff concluded:

> So SNIAS are now, it appears, in the unenviable position that, if the plaintiffs are not restrained from continuing their proceedings in Texas, SNIAS may well be unable to claim over against Bristow Malaysia in those proceedings, and that, if held liable to the plaintiffs in the Texas court, they may have to bring a separate action in Brunei against Bristow Malaysia in which they may have to establish their own liability to the plaintiffs before they can be entitled to claim contribution from Bristow Malaysia, with all the attendant difficulties which this would involve, including the possibility of inconsistent conclusions on the issue of liability.
>
> Their Lordships are of the opinion that for the plaintiffs to be permitted to proceed in a forum, Texas, other than the natural forum, Brunei, with that consequence could indeed, lead to serious injustice to SNIAS, and that the plaintiffs' conduct in continuing with their proceedings in Texas in these circumstances should properly be described as oppressive. Furthermore, no objection to the grant of an injunction to restrain the plaintiffs from continuing with these proceedings can be made by them on the basis of injustice to them, having regard to the undertakings given by SNIAS. It follows that, in their Lordship's opinion, an injunction should be granted.

The applicants here submit that they are in a stronger position than were the plaintiffs in *SNI* because:

1. If required to defend in Texas, they face difficulties analogous to but greater than those which faced *SNI* in seeking to maintain its claim over against Bristow Malaysia.

2. Unlike *SNI*, where undertakings by the plaintiffs removed the most obvious sting created by the Texas action, this is a case in which the Texas proceedings are vexatious or oppressive on the ground

that the plaintiffs are seeking, in an inappropriate forum, to impose 'a strict liability or liability for punitive damages which would not be available in the natural forum.'

## *SHOULD THE W.C.B. AND THE INDIVIDUAL CLAIMANTS BE ENJOINED FROM PROCEEDING IN TEXAS?*

The starting point for the applicants' submission is that B.C. is the natural forum for trying the issues raised in the Texas action. They point to the fact that the claimants, in their Texas pleadings, assert that all of the "acts and omissions" which are the subject of the claim occurred in Canada. The claimants are B.C. residents or, at least, resided in B.C. at the material time. It is here that they suffered injury and were admitted to compensation. If the case is tried in Texas, it is asserted, the law of British Columbia must be applied.

The asbestos companies also assert that the case has virtually no natural connection with Texas. None of the asbestos companies is a Texas corporation and, with one or two exceptions, they are not shown to have had any connection with that state other than the sale of certain of their products. It is not, as I understand it, alleged by the claimants that the products in issue in the Texas action were manufactured or produced in Texas.

The asbestos companies assert that, if the action is tried in Texas, they will suffer unfair prejudice in a number of respects. Before dealing with those contentions, I will consider the narrower argument, based on certain of the language in *SNI*, that the Texas proceedings should be held to be vexatious and oppressive on the ground (to paraphrase Lord Goff's language in *SNI*) that the claimants are seeking, in an inappropriate forum, to impose a strict liability or liability for punitive damages which would not be available in the natural forum. The suggestion is that in *SNI* the plaintiffs' attempt to impose liability in that way would, had it not been for those points having been "neutralized" by the

undertaking of the plaintiffs not to rely on strict liability or the Texas law of damages, have been sufficient to found the injunction. I am not sure that the passage goes that far. Lord Goff simply notes an argument and explains why it need not be decided—the points have "ceased to have such relevance as they might otherwise have had". But even assuming that the passage in question intends to lay down in *dicta* that the Texas proceeding should be found vexatious and oppressive if the plaintiffs sought to impose strict liability or liability for punitive damages which would not be available in the natural forum, that must rest on the premise that Texas is an "inappropriate forum". That I take to be a description of an action in which, in the view of Lord Goff as expressed at p. 523(d):

> . . . there was absolutely nothing to connect the action with Texas at all.

That sentence, with great respect, I find somewhat puzzling, not only because of the uncharacteristically hyperbolic "absolutely" and "at all". True, there was much to connect the action with Brunei. The plaintiff was a resident of that country, the accident occurred there and his dependents continue to live there. The aircraft had been manufactured in France, was owned in England and was operated by a Malaysian company which was a subsidiary of an English company. But does it follow that there was nothing to connect the action with Texas? In *Castanho v. Brown & Root*, the plaintiff, who was Portuguese, was injured in England while serving on a ship owned by a Panamanian company and serviced by an English company. But those two companies were controlled by a Texas company and so, in the view of the Law Lords, there was a sufficient connection that, had the plaintiff sued first in Texas, the English courts would not have enjoined him from suing there. As Lord Scarman said at p. 576:

> Texas is as natural and proper a forum for suing a group of Texan-based companies as England—even

though England, as the scene of the accident is also a natural and proper forum.

In *SNI*, there was a link with Texas in that the manufacturer had a Texan subsidiary through which it sold its aircraft. That was enough, it would appear, to satisfy the law of Texas relating to jurisdiction and venue. Applying the reasons in *Castanho*, it would seem possible that would be enough to establish a connection with Texas. The Privy Council rejected that view without reference to the question. This matter could be relevant here because the corporate familial link between certain of the asbestos companies and Texas seems, in basic characteristics, to be similar to those in *Castanho* and *SNI*, and to fall between the fact patterns of those two cases.

Despite my difficulty in accepting that the action against *SNI* was "absolutely unconnected" to Texas, I can conceive of circumstances on which there would be a complete lack of connection, and yet where the foreign court might accept jurisdiction. Take as an example a common running down case occurring in this province involving a resident pedestrian (plaintiff) and resident driver (defendant). Assume that, while the defendant is changing planes at Dallas while *en route* from Vancouver to Paris, the plaintiff has him served with process issued in Texas. In those circumstances, were the Texas court to hold itself unable to stay the action on the ground of *forum non conveniens*, a B.C. court might well find B.C. to be so clearly the natural forum, and the Texas action to be so clearly vexatious and oppressive, that it would grant an injunction against its continuation.

In this case, the claimants have a similar link with British Columbia in that they live here and suffered damage here. But the position of the defendants is fundamentally different. None of them, as far as the evidence shows, was ever present here. The damage alleged to have been suffered by the plaintiffs did not result from conduct committed here. Indeed, in the case of all but one of the 26 asbestos companies, it appears that the acts and omissions alleged against them must have occurred (if they did occur) outside Canada.

On this point, the asbestos companies place much reliance upon the language of the complaint in the Texas action which, through several amendments, continues to assert that "all of the acts and omissions complained of took place in Canada". Had that assertion been made in a British Columbia pleading, I might be bound to hold the claimants to it. But I cannot, in the circumstances here, give that much effect to what seems to be a pro forma plea. Reading the complaint as a whole, it is clear that the negligence, the failure to warn, the "consorting", the fraud and other species of misconduct alleged against the asbestos companies must have taken place, if at all, where those companies carried on business. And that, except for Carey-Canada, appears to have been in the United States. For that matter, Carey-Canada Inc. is itself a subsidiary of an American corporation—so it may have been in the offices of the parent that the acts and omissions were committed.

This case therefore lacks the exclusive connection with B.C. of the running down case which I postulated. The evidence pertaining to the claimants—the fact of the exposure to asbestos, the fact of illness resulting from such exposure, the facts relevant to proof of damages—all that, it is reasonable to think, is to be found in this province. But evidence essential to making out a case against the defendants must be found elsewhere. The crucial aspects of that case, as I see it, are the allegations that the asbestos companies knew of the dangerous propensities of their product and failed to warn about, or perhaps even actively concealed, those propensities.

Both Canada and the United States are federal states. It may be relevant to consider how the question would be approached if they were unitary states. Would one conclude that Canada was the natural forum? Or would it be right to say that, because almost all of the defendants reside and carry on business in the United States, and because the evidence of some of the most crucial facts must be developed there, that country is, in the words of Lord Scarman, "as natural and proper a forum for suing" this group of U.S. based companies as Canada. In my view, it would certainly

be right to regard the United States as, at least, a natural forum.

That being so, does it matter which American state is chosen as the forum? The asbestos companies do not have their principal presence in any one state. It may be that Texas is a natural forum for some of the asbestos companies and not for others. Neither side suggests that the issue should be resolved separately in respect of separate companies but the asbestos companies do assert that the claimants have structured the Texas action so as to preclude the case being transferred to a more convenient forum within the United States. The allegation is put this way in para. 20(p) of the Statement of Claim, the truth of which is supported by evidence of an American attorney:

> (p) the Defendant Workers' Compensation Board and the Individual Defendants, by virtue of the fact that they claim to reside in the same jurisdiction as the Plaintiff Carey-Canada Incorporated, namely, Canada, and have joined as a defendant therein a company alleged to have a principal place of business in Texas, have prevented the Plaintiffs from having the Texas Action removed to the United Stated Federal Court, and have, thereby, prevented the Plaintiffs from, *inter alia*, having the issues raised in the Texas Action tried in a more convenient venue, e.g., in the State of Washington, to which British Columbia witnesses and parties might more reasonably or conveniently travel for the purpose of giving evidence or having common issue tried and resolved, and, further, from having the doctrine of *forum non conveniens* applied by the Federal Court;

For a number of reasons, I do not think that I can hold, as the Privy Council did in *SNI*, that Texas is a wholly inappropriate forum. In saying that, I have regard to the nature of the cause of action which arises, not from a specific incident in one location, but from a continent-wide "stream of commerce", to the fact that some of the asbestos companies have

a direct link with Texas, and to my difficulty in concluding that any particular court in the United States is the natural forum. I do conclude without doubt that British Columbia is a more natural forum than Texas and, to a high degree of probability, that some other court in the United States would be a "more natural" forum that the court presently trying the Texas case. But, as I read the authorities (including *SNI* which appears to be the case most favourable to the asbestos companies) I do not think that is a sufficient ground by itself to support an order enjoining the claimants from proceeding in Texas.

From that it follows that the approach must be as in Castanho—the advantages conferred on the claimants by proceeding in Texas must be weighed in their favour as a legitimate juridical advantage. In saying that, I do not, of course, rule that the claimants are entitled in Texas to the benefits of the strict liability rule—it will be for the Texas court to determine the law to be applied. But the possibility of persuading that court to apply Texas law must be seen as an advantage to them. The claimants point to other juridical advantages, including the advanced state of their preparation in Texas, the early trial date, and the advantage of pressing their claims in a jurisdiction which has become thoroughly familiar with this kind of case and through lawyers who have become experts in the field. Those are all juridical advantages of which the claimants should not be lightly deprived.

As against that, the asbestos companies put forward an imposing list of factors which they say place them at an unjust disadvantage, and therefore compel the conclusion that for these B.C. claimants to proceed in Texas is oppressive conduct which ought to be enjoined. Firstly, much is made of the fact that the "real client" is the W.C.B. The suggestion is that it is repugnant to the legislative scheme of the *Workers Compensation Act* for the W.C.B. to pursue a subrogated claim in a foreign jurisdiction. I do not accept that proposition. Quite apart from the fact that the individual claimants have a personal interest in the claims, being entitled to any excess recovery over the valuation of the com-

pensation paid, I see nothing in the statute to preclude the Board from suing outside this province.

Mr. Williams, in his written outline, asserts that, if the Texas action proceeds, the asbestos companies will be prejudiced in these respects:

(a) the Producers have a claim for contribution against another producer, namely, Cassiar, but they cannot bring the claim against Cassiar in Texas and would have to sue in British Columbia to get contribution because:

  (i) Cassiar is not subject to the Texas Courts' jurisdiction;

  (ii) under British Columbia law (section 41.1, of *Court Order Enforcement Act*) Cassiar is immune from 'foreign judgments';

(b) under section 10(7) of the *British Columbia Workers' Compensation Act*, the Producers are entitled to have taken out of account of any damages awarded against them any loss or damage caused by the personal Defendants' 'employers' or 'co-employers', and to have the amount of such damage determined in the same action as the subrogated claim is made, but there is no practical prospect that the Texas Court can do that in the Texas Action.

(c) the Producers' claims for contribution and indemnity against others cannot be tried in the Texas Action either, because the other necessary parties are not subject to the Texas Courts' jurisdiction;

(d) the Producers will be exposed to all of the dangers of a multiplicity of proceedings, e.g., possibility of inconsistent findings in separate jurisdictions;

(e) W.C.B.C. has commenced approximately 21 substantially similar actions in British Columbia against most of the Producers, which they will have to defend as well as the Texas Action;

(f) since it is clear that B.C. law will apply, the Texas judge and jury will have to deal with many difficult issues of British Columbia law, e.g., applying Canadian 'standards' and 'norms' regarding asbestos in determining 'negligence', 'inherently dangerous produce', 'punitive damages', etc., and such questions whether the claim for conspiracy is one which can be maintained at all under British Columbia law;

(g) virtually all of the evidence and records are located in B.C., the witnesses cannot be subpoenaed to testify in Texas, the letters rogatory—deposition process is exorbitantly expensive and practically impossible to apply to this many claims—and even if the Producers win they do not recover their expenses and 'costs' in Texas;

The point adverted to at the end of subparagraph (f) in that passage may be significant if British Columbia law ought to be applied to the issue whether the asbestos companies conspired to cause damage. Presumably the allegation in the Texas action of "consorting" is tantamount to an allegation of conspiracy. However, the question whether conspiracy is available in such an action is presently awaiting determination by the Supreme Court of Canada, which has granted leave to certain of the asbestos companies in one of the B.C. cases to appeal against the decision of the Court of Appeal (reversing the decision of this court) that the claim in conspiracy should not be struck out but that its availability should be decided at trial.

I will note here that, amongst the "claims for contribution and indemnity against others" referred to in the passage which I have quoted from the outline, is a possible claim against the W.C.B. based on the contention that, during all the years in which the claimants are alleged to have been exposed to asbestos in the workplace, the W.C.B. had a power and responsibility to inspect, to make regulations, and generally to prevent workers being at unreasonable risk. The asbestos companies say that, while it may be possible to

implead W.C.B. in Texas, such a claim over against it could not practically be prosecuted there because all the evidence would have to be found here.

The asbestos companies also assert a possible claim against the federal Crown for, in effect, failing to exercise its regulatory powers. Such a claim could not, the companies say, be entertained in an American court because of the doctrine of sovereign immunity.

In answer to the catalogue of particulars of oppression put forward by the asbestos companies, the claimants say that those companies are, at the very last moment, conjuring up a host of fictitious difficulties in a desperate attempt to put off the day of judgment in Texas. They say that the Texas action is litigation of a kind which has become commonplace in the United States and with which U.S. litigants and lawyers, particularly the asbestos companies and their lawyers, have become thoroughly familiar, and that those companies have seized upon the insignificant distinction of the claimants being resident in Canada and of the W.C.B. being subrogated to most of the claims as a mere ploy.

The claimants emphasize that the Texas action was begun 16 months before this action was begun, and 2 months after the trial date of December 18 was fixed. From all of that, I am asked to infer that the real reason behind the ploy is not the existence of oppression, but the realization by the companies that, if the action proceeds to trial, they will properly be held liable for large sums of damages. The claimants point out that the list of difficulties now advanced as constituting oppression was apparently not put forward in the proceedings before the Texas court seeking to stay the action on the ground of *forum non conveniens*.

In answer to that, the companies say that they do fear that, if the trial proceeds they will be held liable for very large amounts of damages, but that such a verdict would not be "proper" because they will have been subject to oppression. By way of a more specific reply, they say that, seen in perspective, the time occupied by the action has been short. Most of the claims, including some of those scheduled for trial this month, were launched long after July, 1988, some

very recently. The asbestos companies say that they had great difficulty in getting information to prepare a defence and that most of the time since July, 1988 can be accounted for on the basis that they were occupied in pressing their application to the Texas courts for a stay, and that it was not until they had exhausted their rights in that direction that they could turn their efforts to defending on the merits. Much of the information upon which they base the present assertions of oppression came to them in the course of depositions of the claimants and their witnesses which began after September 6. They assert that, as matters stood in September, 1989, the fixing of a trial date 3 months away allowed far too little time for them to prepare their defence. They account for the lateness of this application on the ground that it would not have been appropriate for them to come to this court before exhausting their remedies in Texas, a proposition for which there is some support in *SNI*; and that the 2 months since then have been taken up in obtaining facts and preparing the formidable body of material put forward in support of this application.

It is extraordinarily difficult at this stage to arrive at a clear view as to the reality of some aspects of the asserted oppression. Take the Cassiar issue as an example. If there is substance in the assertion of the asbestos companies that they have a claim for contribution against Cassiar, that would provide a compelling ground for enjoining an action outside B.C. That ground would be analogous to, but probably even stronger than, the ground on which the Privy Council decided *SNI*, i.e., that the manufacturer could not take third party proceedings against *Bristow Malaysia* in Texas. But, in that case, there had been proceedings begun in Brunei against Bristow Malaysia by the manufacturer, and there was a solid basis in the evidence for concluding that to be a very substantial issue. But here, the asbestos companies can point to nothing more than a somewhat vague recollection of one witness on a deposition that he saw in the workplace bags of asbestos with the name Cassiar on them. As against this, there is somewhere in the record a copy of a letter from Cassiar to a lawyer for the asbestos companies in which Cassiar

asserts that it never produced asbestos of the kind which is said to have injured the claimants. The asbestos companies concede that the evidence at this stage is not strong but say that it is enough to create a reasonable possibility that, upon investigation, they could establish a claim against Cassiar.

In respect of most of the grounds listed under (e) to (g) in Mr. Williams' catalogue, I find similar difficulties in assessing whether there is substantial basis for them. I cannot see that point (e) can be a matter of substance. The actions in this province, the number of which has apparently grown from 21 to over 50 in recent weeks, were brought to pursue claims of persons other than the individual claimants in the Texas action. That was because, as Mr. Camp explains, for one reason or another, perhaps a more relaxed statute of limitations, the advisors of the W.C.B. and the claimants considered the juridical advantage to them to lie with the proceeding in this province. Given the enormous scale of this type of claim, I do not think it can by itself be oppression for some claimants to sue here the same companies which are being sued in Texas, even though the W.C.B. has the direction of the actions brought in each jurisdiction.

I can say also now that I am unimpressed with a somewhat different point much relied on by Mr. Williams. It is put this way in his outline:

> If the Defendants can recover damages on the 'Texas scale" without any real jurisdictional claim to justice in Texas, the disparity between the damages awarded to them and those awarded to other Canadians who are in British Columbia (which is the natural forum) will undermine the Supreme Court of Canada's clearly enunciated policy of moderation and uniformity for non-pecuniary awards to Canadians wherever they reside.

It is my view that the "trilogy" applies only to cases in Canadian courts and that the rough upper limit enunciated there cannot have the effect of depriving Canadian citizens who sue in foreign jurisdictions of enjoying the juridical advantage of higher damages. I note that this point

(although, of course, without reference to the rough upper limit) was pressed eloquently and at length but without success by counsel for the defendant in *Castanho v. Brown & Root* (*supra*), (see the argument at p. 561-2).

But as to the other matters put forward, I am in some degree left in a state of uncertainty as to whether they establish oppression of the asbestos companies. The element of time may work in either direction. Undoubtedly, it would be a great advantage to the claimants to proceed to trial in Texas this month. Clearly, that would be a disadvantage to the defendants—but is it a disadvantage which amounts to oppression? If it does, then justice requires the grant of an injunction. The lateness of the application to this court is not an insuperable objection. In *SNI*, the Privy Council handed down judgment on May 14, knowing that the result would be to enjoin proceeding with a trial which was set to commence in Texas on June 1, after being adjourned several times from the first date of November 10 in the previous year.

That brings me to one of Mr. Camp's principal points of attack on the decision in *SNI*. He says that the Privy Council paid insufficient regard to the decision of the Texas court on *forum non conveniens* because, by the ordinary rules of comity, it should have been prepared to defer to the decision of the Texas court on the question whether proceeding in that jurisdiction would be oppressive of the defendant. In that case, Lord Goff dealt with the manner in this way at p. 515:

> On 14 March 1986 the plaintiffs filed a motion to retain; and on 28 May 1986 the defendants filed a motion to dismiss on the ground of forum non conveniens. The court decided not to dismiss the action for want of prosecution, but fixed a trial date for 10 November 1986. Briefs were filed on the motion to dismiss on the ground of forum non conveniens. This motion was opposed by the plaintiffs on two grounds: (1) that, where a claim is made under the Texas Wrongful Death Statute, as a matter of construction the doctrine of forum non conveniens has no application; and (2) that, in the alternative, the court should in any event exercise it discretion to

> refuse the defendants motion on the ground of forum non conveniens. On 14 August 1986 the Texas court refused the defendants' motion. In accordance with the practice of that court, no reasons were given for the decision; it is impossible therefore to know whether the decision was made on the first or the second ground advanced by the plaintiffs, nor, if the decision was made on the second ground, for what reasons it was held that the Texas court should not give effect to the doctrine of forum non conveniens. Furthermore, under the procedure of the Texas court, no appeal lay from this decision. An attempt was made to have the decision reviewed by petitioning the Court of Appeals for a writ of mandamus; but this failed, the petition being dismissed on 2 October 1986. A further petition to the Texas Supreme Court was dismissed on 5 November 1986; and a petition for a rehearing was dismissed on 3 December 1986. By then, the defendants had exhausted their remedies in Texas.

There the matter was left by the Privy Council—simply as part of the recital of the chronology. I think it likely that, had the Law Lords been able to conclude that the Texas court had considered the issue of *forum non conveniens* on the merits, they would have paid substantial deference to the decision of that court. In this case, for the reasons which I stated earlier, I conclude as a matter of fact that the applications of the asbestos companies were dismissed on what Lord Goff called the first ground, *i.e.*, that as a matter of construction the doctrine of *forum non conveniens* has no application in that state. Once that conclusion is reached, I see no basis for deferring to a decision which establishes only that the jurisdiction in which the claimants wish to proceed is one which, as a matter of its domestic law, does not adhere to the broad considerations of comity which lie at the root of *forum non conveniens*. It does not necessarily follow that the Texas defendants are being oppressed by being sued in that jurisdiction, but the refusal of Texas to accept *forum non conveniens* is a ground which can in my view be weighed in the

balance in favor of those defendants in determining whether there has been oppression.

That brings me to consider the troubling question of the "anti-anti-suit" injunction granted in Texas on November 20, 1989. To explain the nature of that order, and its significance, it is necessary to give some explanation of the background. This action was begun on November 10. The asbestos companies applied forthwith for an ex parte injunction to prevent the claimants, the plaintiffs in the Texas action, from taking any step in that jurisdiction to obtain an injunction to prevent the asbestos companies from seeking the injunction which is the subject matter of this application, the application for which was issued with the writ on November 10, returnable on November 16. At the same time as they applied for the ex parte injunction, the plaintiffs applied for and obtained leave to effect substitutional service on the claimants of all of the documents issued in this action on November 10, including the ex parte injunction granted on that day.

That order was based upon evidence from the Texas lawyers for the asbestos companies to the effect that, on the basis of their previous experience, it was likely that, before the hearing of this application, the plaintiffs in the Texas action (defendants here) would apply for an injunction restraining the asbestos companies from attempting to obtain the anti-suit injunction.

On the return of the injunction application on November 16, at the request of counsel for the W.C.B., I adjourned this application to November 21 but heard a motion, brought by Mr. Camp on behalf of the W.C.B. and one claimant, to set aside substitutional service upon all of the claimants of all of the process issued on November 10. As part of the evidence on that application, the W.C.B. filed an affidavit testifying, in effect, that a number of the individual claimants reside in provinces other than British Columbia and that their claims have no connection with this province or the W.C.B. Mr. Williams, counsel for the asbestos companies, conceded that, if any claimants were proved to be in that position, he could not contend that they were subject to being enjoined by this

court. Mr. Camp, for the W.C.B., declined to name the persons in that position unless Mr. Williams would undertake not to seek, in the provinces in which those persons live, an anti-suit injunction. That undertaking was not given. There the matter remained at the end of the hearing on November 16. On November 20, I delivered reasons for dismissing the application to set aside the order for substitutional service. When this application came on for hearing on November 21, I learned by way of an affidavit of Mr. Joe Cox, a Texas attorney for the W.C.B. and the claimants, that he was present in the courtroom here on November 16 and had heard the exchange between Messrs. Williams and Camp, that he had returned to Texas over the week-end and, on the morning of November 20, probably before decision was given in the application to set aside service *ex juris*, applied to the trial judge in Texas for and obtained an ex parte injunction enjoining the asbestos companies from seeking an injunction against the claimants who, according to Mr. Cox, live outside British Columbia. I say "according to Mr. Cox" because, even at this stage, there has been no decision of this court on the question whether any of the claimants are beyond the jurisdiction of this court, and no order setting aside the ex parte injunction granted against them on November 10. The asbestos companies have filed affidavits which, in some degree, dispute the assertions by Mr. Cox as to the extent of connection between the 40 claimants in favour of whom the injunction was granted and this jurisdiction.

In response to my query as to the propriety of Mr. Cox' audacious step, Mr. Camp responded that what was sought and obtained in Texas is no different in principle from the ex parte injunction obtained here on November 10 or the injunction sought on this application. Each of those orders, if granted, has the effect of effectively restricting the exercise of the jurisdiction of another court. While that much is true, that does not meet the point. The anti-suit injunction has long been a recognized aspect of private international law which is not inconsistent with principles of comity. Where questions arise as to which jurisdiction is the more appropriate for trying a case, it is well established law in both the

Commonwealth and the United States that each forum recognizes the right of the other to pass on the question and that, where such conflicts arise, the court of each forum should pay reasonable deference to the decisions of the other. That does not apply to the order, the seeking of which was enjoined here on November 10, which was made in Texas on November 20. That order involves the court in restraining one side in the action before it from taking the proper step of seeking, in the other jurisdiction, to obtain an injunction. In my view, with all due respect, an order of that kind cannot be squared with basic considerations of comity.

That applies equally to the comparison sought to be made between the ex parte injunction granted here on November 10 and that granted in Texas on November 20. Counsel for the W.C.B. says that the two cannot be distinguished and so (he did not put it quite this way) "B.C. started it". I disagree. The November 10 order was pronounced to preserve the effectiveness of the jurisdiction of this court to consider whether persons who are subject to the law of this province ought to be enjoined from suing elsewhere. That was simply a matter of preserving the right of the Texas defendants to take a step properly open to them, and is fundamentally different from preventing those defendants from taking that step.

I said earlier that I have found it difficult to determine what degree of substance there is in the complaints of oppression by the asbestos companies. My inclination, on the basis of the facts and submissions other than those relating to the decisions made in Texas, was to dismiss the application for an injunction. What is sought is an order of a very drastic kind for which there is no precise precedent. In all other cases drawn to my attention, the application to enjoin proceedings in a foreign jurisdiction has been brought in litigation already commenced in "this" jurisdiction. All of the authorities insist upon the use of great caution in exercising this power.

On further reflection, I have thought it right to weigh in the balance these considerations:

1. The forum in which the claimants seek to pursue their claims is one which does not recognize the basic considerations of comity inherent in the doctrine of *forum non conveniens*. So, in deciding whether there has been oppression, no weight can be given to the decision of the court in that forum refusing a stay because it is not open to that court to consider such matters.

2. The order of November 20 indicates unwillingness on the part of the Texas court to permit the issue of oppression to be considered in the forum in which the claimants reside, and has thus gone beyond merely declining to consider the issue of *forum non conveniens* to take a positive step to prevent the defendants before it from obtaining a decision on that issue.

Weighing those matters in the balance, I conclude, in the words of Lord Goff in *SNI* at p. 526, that ". . . the (claimants') conduct in continuing with their proceedings in Texas in these circumstances should properly be described as oppressive". I further conclude that the potential injustice to the defendants clearly outweighs whatever prejudice the claimants may suffer in not being permitted to proceed in Texas. I have considered the cases, from *Wheatley v. Ellis*, 61 B.C.R. 55 to *A.G.B.C. v. Wale et al.*, [1987] 2 W.W.R. 331, which lay down the tests for granting an interim injunction. I hold that there is a fair question to be tried as to the existence in breach of the right asserted by the asbestos companies to not be sued in Texas, and that the balance of convenience favours the grant of the injunction. Applying those tests in light of the *SNI* line of cases, I hold this to be a proper case in which to grant the injunction, subject to one further question to which I now turn.

*IS THERE POWER TO GRANT AN INTERLOCUTORY INJUNCTION?*

At this point, I must consider the submission of the claimants that no interlocutory injunction can be granted because the asbestos companies have advanced no "viable" claim for other relief in this action. They say with some force that the assertion of abuse of process is on its face, without substance. That is a tort of very limited application, an essential element of which is that the process must have been invoked for an improper purpose collateral to the ostensible purpose of the proceeding. See *Crowston v. Cove Developments Ltd.* (1978), 10 C.P.C. 88 (B.C.S.C.), (aff'd Feb. 8, 1980, CA790107). No allegation of that kind is made here. There is the additional difficulty in this case that the process complained about was issued in another jurisdiction. I conclude that this cause of action is brought forward only to attempt to satisfy the rule that an interlocutory injunction can be granted only as ancillary relief. I grant Mr. Camp's application to strike out that plea and the claim for damages.

That leaves the claims for declarations. I think it is now accepted that an interlocutory injunction can be granted as ancillary relief to a claim for a declaration but I have doubts whether the declarations asked for are, in substance, anything more than an indirect way of alleging that the claimants should be enjoined from proceeding in Texas. I accept that only substantial relief sought in the action is the injunction.

The question whether an interlocutory injunction can be granted except where it is ancillary to other relief being sought in the action is one which has been much considered by the English courts in recent years, and specifically in relation to injunctions of this general kind. Virtually all of the cases to which I have been referred in which anti-suit injunctions have been granted have been ones in which the application was brought in already existing litigation. But in many cases, of which *Castanho* and *SNI* are examples, the application was brought by defendants in the action who could not be said to be seeking an injunction as ancillary to other relief being sought by them. I think that the better view is that this

form of injunction constitutes an exception to the basic principle restricting the grant of injunctions to certain exclusive categories. That view was adopted by the House of Lords in what appears to be the most authoritative case on the point; *South Carolina Co. v. Assurantie N.V.* [1987] 1 A.C. 24, per Lord Brandon at p. 40. It is interesting to note that Lord Brandon, speaking for the majority on this view, took a narrower view than that taken by Lord Mackay and Lord Goff, who expressed doubt that the power of the court to grant injunctions is no longer restricted to exclusive categories.

As our underlying law governing the grant of injunctions is essentially the same as that of England, I see no reason not to accept the view of the law stated by Lord Brandon. That is enough to dispose of the objection.

*CONCLUSION*

It follows that I would grant the injunction sought by the asbestos companies except as against the 40 claimants who obtained the ex parte injunction in Texas on November 20. As to them, an issue has been raised whether they have sufficient connection with this jurisdiction to be amenable to an injunction. In any event, I did not understand the asbestos companies to be prepared, at least without further consideration, to press their claim for injunctive relief if to do so might place them in breach of the Texas order. At this stage, it seems most appropriate to simply adjourn the application of the companies as it affects those 40 claimants. I would, however, continue until further order the ex parte injunction granted in this court on November 10 but would vary it to add a prohibition against the W.C.B. or any individual claimant taking any step in Texas seeking to prevent proceedings by the asbestos companies in the Court of Appeal of this province, should they or any of them wish to appeal any aspect of the order now made or any further order which I might make on further consideration.

The grant of the injunction to the asbestos companies is however subject to terms in addition to the usual undertaking

in respect of damages. Those terms will require the asbestos companies to undertake:

1. That, should the claimants or any of them bring action in British Columbia in relation to the matters now being sued upon in Texas, the asbestos companies will attorn to the jurisdiction of this court and will forthwith instruct solicitors here to accept service of any process issued against them by the claimants and will, in any such action, make diligent efforts to assist in having such action or actions brought to trial at an early date.

2. That in any such action or actions, any judgment rendered in favour of the claimants will be given full faith and credit and be as enforceable (subject to rights of appeal) as though rendered in the District court, Harrison County, Texas, 71st Judicial District, United States of America.

3. That evidence already obtained by lawyers through pre-trial depositions and documentary discovery in Action No. 88-0687 in the aforesaid District Court of Harrison County may be used in a British Columbia action brought by the Defendants presently named in the aforesaid Supreme Court Action No. C895759, to the same extent as such evidence could be utilized in the District Court of Harrison County.

If the parties consider that there should be further terms imposed, or that the wording should be different, they may make application in that respect by memorandum through the registry.

Vancouver, B.C.
December 6, 1989

No. C895759
Vancouver Registry

In the Supreme Court of British Columbia

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Amchem Products Incorporated and others

*Plaintiffs*,

Workers' Compensation Board and others,

*Defendants*.

ORDER

BEFORE THE HONOURABLE ) WEDNESDAY, THE 6TH
)
THE CHIEF JUSTICE ) DAY OF DECEMBER, 1989
)

UPON the application of the plaintiff coming on for hearing at Vancouver, British Columbia on November 21, 22 and 23, 1989, and on hearing Bryan Williams, Q.C. and Terrance A. Kowalchuk, counsel for the plaintiffs, J.J. Camp, Q.C. and D.P. Church, counsel for all of the defendants other than Cassiar Mining Corporation and those defendants identified in Schedule "A" hereto, and W.O. 'M Forbes, counsel for the defendant, Cassiar Mining Corporation, and no one appearing for the other defendants although the said defendants were duly served substitutionally pursuant to the Order herein made on November 10, 1989; and on reading the Affidavit of Christopher Dodson, sworn in action number A893039, Vancouver Registry, the 13th day of November, 1989 and the following Affidavits in the action herein: the Affidavit of Gregory H. Bevel sworn November 9, 1989, two Affidavits of Wayne Shirley both sworn November 14, 1989, and the Affidavits of Ken Dadson, sworn November 15, 1989, Terrance A. Kowalchuk sworn November 15, 1989, Cindy L. Brandes sworn November 15, 1989, J.J. Camp, Q.C. sworn November 16, 1989, Joe Fiorante sworn Novem-

ber 16, 1989, Gene Williams sworn November 16, 1989, Joseph B. Cox Jr. sworn November 20, 1989, Joseph B. Cox Jr. sworn November 20, 1989, Michael B. Sydow sworn November 18, 1989, Stephen Antle sworn November 20, 1989, Elizabeth L. Phifer sworn November 21, 1989, Gregory H. Bevel sworn November 21, 1989, Edward Bates sworn November 22, 1989 and Joseph B. Cox Jr. sworn November 22, 1989 and the following Affidavits in action number C895781, Vancouver Registry, between the Flintkote Company, plaintiff, and Workers' Compensation Board and others, defendants: the Affidavit of Paul J. Holmes sworn the 9th day of November, 1989 the Affidavit of Patricia Munro sworn the 6th day of November, 1989, and the Affidavit of Susan E. Fraser sworn the 16th day of November, 1989, and the pleadings and proceedings herein and upon judgment being reserved to this date;

AND UPON the plaintiff giving an undertaking to abide by any Court Order this Court may make as to damages occasioned to the defendants as a result of making of this Order;

THIS COURT ORDERS that the defendants, and each of them, except the defendant, Cassiar Mining Corporation and those defendants identified in Schedule "B" hereto, and anyone acting on their behalf be and the same are hereby restrained and enjoined from directly or indirectly further prosecuting or taking any further step in that action in the District Court, Harrison County, Texas, 71st Judicial District, United States of America, Action No. 88-0687, between Marilyn Rose Webb and others, and Amchem Products Incorporated and others (hereinafter referred to as "the Texas Action");

AND THIS COURT FURTHER ORDERS that the application of the plaintiff for a similar injunction as against the defendants identified in Schedule "B" hereto be and the same is hereby adjourned;

AND THIS COURT FURTHER ORDERS that the Order made herein on November 10, 1989 restraining the defendants herein and each of them other than Cassiar Mining Corporation, as therein provided, be until further order of

this Court, continued and varied, so that, henceforth, the defendants herein, and each of them, other than Cassiar Mining Corporation, and anyone acting for or on their behalf, be and the same are hereby restrained from taking any steps, directly or indirectly, to obtain or enforce any injunction, direction, ruling, judgment, or any other order in the Texas Action or otherwise which would have the effect of restraining or preventing the plaintiff from commencing, prosecuting, or taking any steps in this action before this Honourable Court, or from commencing, prosecuting or taking any appeal in this action, should the plaintiff wish to appeal any aspect of this Order or any further order which this Honourable Court may make on further consideration;

AND THIS COURT FURTHER ORDERS that the grant of the injunction hereinbefore set out is, in addition to the undertaking in respect of damages hereinbefore set out, subject to the terms that the plaintiff undertake as follows:

1. That, should the individual defendants or any of them bring action in British Columbia in relation to the matters now being sued upon in Texas, the plaintiff will attorn to the jurisdiction of this Court and will forthwith instruct solicitors here to accept service of any process issued against them by the said defendant and will, in any such action, make diligent efforts to assist in having such action or actions brought to trial at an early date;

2. That in any such action or actions, any judgment rendered in favour of the said defendants will be given full faith and credit and be as enforceable (subject to rights of appeal) as though rendered in the District Court, Harrison County, Texas, 71st Judicial District, United States of America;

3. That evidence already obtained by lawyers through pretrial depositions and documentary discovery in Action No. 88-0687 in the aforesaid District Court of Harrison County may be used in a British Columbia action brought by the defendants presently named in

the within action, namely Supreme Court Action No. C895759, to the same extent as such evidence could be utilized in the District Court of Harrison County.

AND THIS COURT FURTHER ORDERS that if there should be further terms, or if the wording of the terms set forth be different, the parties may make application by memorandum.

BY THE COURT

/s/ Illegible
DEPUTY DISTRICT REGISTRAR
Settled in these terms on 14 May 1990
/s/ Elizabeth Dunn

APPROVED AS TO FORM:

Solicitor for the Plaintiffs

/s/ Illegible
Solicitor for the Defendants
except Cassiar Mining Corporation and
those Defendants identified in
Schedule "A" hereto

Solicitor for the Defendant,
Cassiar Mining Corporation

## SCHEDULE "A"

John Botwood, Gordon Butler, Winnerford Butler, Leo Iverson, Rudolf Jarosch, Margaret Jarosch, Roy Hamilton, Harley Lindquist, Joan Lindquist, Barbara Ponech, Ivan Risen, Stephanie Risen, Edwin Torwick, Floyd Wikstrom, Shirley Wikstrom, Joachim Winter, Kenneth Flaman, Richard Castelein, Karen Castelein, Elain Castelein, Irene Doiron, Laurette Doiron, Renee Doiron, Delores Doiron, John Doiron, Raymond Doiron, George Doiron, Dannell Bazen, Janet Bazen, Cloryl Bazen, June McDonald, Shannon McDonald, Prudence Dabe, Sandra McCullen, Sheila McDonald, Shelley Shaw, Roland Schmidtke, Margaret Schmidtke, Arthur Sonier, Evelyn Sonier, David Clements

## SCHEDULE "B"

John Botwood, Gordon Butler, Winnerford Butler, Leo Iverson, Rudolf Jarosch, Margaret Jorosch, Roy Hamilton, Harley Lindquist, Joan Lindquist, Barbara Ponech, Ivan Risen, Stephanie Risen, Edwin Torwick, Floyd Wikstrom, Shirley Wikstrom, Joachim Winter, Kenneth Flaman, Richard Castelein, Karen Castelein, Elain Castelein, Irene Doiron, Laurette Doiron, Renee Doiron, Dannell Bazen, Janet Bazen, Cloryl Bazen, June McDonald, Shannon McDonald, Prudence Dabe, Sandra McCullen, Sheila McDonald, Shelley Shaw, Roland Schmidtke, Margaret Schmidtke, Arthur Sonier, Evelyn Sonier,